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OF THE

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OF THE

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<i>Appeal dismissed: 151 N. Y. 511.</i>	
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<i>Appeal dismissed: 151 N. Y. 511.</i>	
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<i>Judgment reversed: 152 N. Y. 508.</i>	
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<i>Judgment reversed: 153 N. Y. 316.</i>	
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<i>Judgment affirmed: 153 N. Y. 443.</i>	
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<i>Order affirmed: 153 N. Y. 682.</i>	
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<i>Order affirmed: 153 N. Y. 1.</i>	
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<i>Order affirmed: 154 N. Y. 109.</i>	
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<i>Judgment reversed: 153 N. Y. 124.</i>	
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<i>Judgment affirmed on opinion below: 152 N. Y. 639.</i>	
MATTER OF THRALL	12 App. Div. 235
<i>Order affirmed on opinion of VAN BRUNT, J., below: 153 N. Y. 644.</i>	
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<i>Judgment affirmed: 151 N. Y. 611.</i>	
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<i>Judgment affirmed on opinion below: 151 N. Y. 623.</i>	
MCCURDY v. N. Y. L. INS. & TRUST Co	83 Hun, 612
<i>Judgment affirmed on opinion below, on first appeal, reported 36 N. Y. St. Repr. 566: 151 N. Y. 667.</i>	
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<i>Judgment affirmed on opinion below: 153 N. Y. 679.</i>	
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<i>Judgment affirmed: 153 N. Y. 659.</i>	
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<i>Judgment affirmed: 151 N. Y. 624.</i>	
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<i>Judgment affirmed on opinion below: 153 N. Y. 652.</i>	
NITCH v. AMERICAN CENTRAL INS. CO.....	88 Hun, 614
<i>Judgment and order affirmed: 152 N. Y. 635.</i>	
O'BEIRNE v. BULLIS.....	80 Hun, 570
<i>Judgment affirmed: 151 N. Y. 872.</i>	
O'BRIEN v. SMITH.....	77 Hun, 610
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<i>Order affirmed on opinion below : 151 N. Y. 664.</i>	
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<i>Judgment affirmed : 153 N. Y. 576.</i>	
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<i>Judgment and order affirmed : 154 N. Y. 101.</i>	
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<i>Order affirmed : 153 N. Y. 646.</i>	
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<i>Order affirmed : 153 N. Y. 689.</i>	
PEOPLE EX REL. SIMERMAYER v. ROOSEVELT	1 App. Div. 434
<i>Order affirmed, with costs : 151 N. Y. 675.</i>	
PEOPLE EX REL. STRAUSS v. ROOSEVELT.....	2 App. Div. 586
<i>Order affirmed on opinion below : 153 N. Y. 657.</i>	
PEOPLE EX REL. WARD v. ROOSEVELT.....	9 App. Div. 626
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<i>Judgment affirmed: 152 N. Y. 652.</i>	
PITTS v. N. Y., L. E. & W. R. R. Co.....	79 Hun, 546
<i>Judgment affirmed: 152 N. Y. 628.</i>	
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<i>Order affirmed on opinion below: 153 N. Y. 670.</i>	
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<i>Order affirmed and judgment absolute ordered against the defendant on the opinion of the trial judge: 151 N. Y. 626.</i>	
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<i>Motion to dismiss appeal granted: 151 N. Y. 633.</i>	
RAPALYEA v. ANDERSON.....	7 App. Div. 612
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<i>Judgment affirmed: 153 N. Y. 641.</i>	
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<i>Judgment and order reversed: 153 N. Y. 403.</i>	
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<i>Judgment affirmed: 152 N. Y. 655.</i>	
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<i>Judgment affirmed: 152 N. Y. 640.</i>	
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<i>Judgment affirmed: 153 N. Y. 638.</i>	
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<i>Motion to dismiss appeal denied, provided, within ten days, undertaking is served and appellant pays ten dollars costs, and in default motion granted: 152 N. Y. 643.</i>	
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<i>Judgment affirmed: 152 N. Y. 652.</i>	
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<i>Judgment affirmed: 151 N. Y. 625.</i>	
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<i>Judgment dismissing the complaint, without requiring the defendant to give any proof, reversed and new trial granted: 151 N. Y. 628.</i>	
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<i>Judgment dismissing the complaint, without requiring the defendant to give any proof, reversed and new trial granted: 151 N. Y. 628.</i>	
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<i>Judgment affirmed: 154 N. Y. 61.</i>	
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<i>Judgment reversed: 152 N. Y. 174.</i>	
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<i>Order affirmed and judgment absolute ordered for defendant: 151 N. Y. 672.</i>	
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<i>Judgment affirmed on opinion below: 153 N. Y. 681.</i>	
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<i>Judgment affirmed: 151 N. Y. 655.</i>	
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<i>Judgment affirmed: 152 N. Y. 327.</i>	
SMITH v. N. Y. C. & H. R. R. Co.....	88 Hun, 468
<i>Judgment affirmed: 153 N. Y. 664.</i>	
SMITH v. REICH.....	80 Hun, 287
<i>Judgment affirmed on opinion of General Term: 151 N. Y. 642.</i>	
SPEARS v. WILLIS.....	78 Hun, 609
<i>Judgment affirmed: 151 N. Y. 443.</i>	

SPENCER v. KILMER.....	80 Hun, 605
<i>Judgment reversed and a new trial granted, unless the plaintiff stipulates to reduce the judgment as directed in the opinion. If such stipulation be given, the judgment, as thus modified, affirmed : 151 N. Y. 390.</i>	
STANDEN v. BROWN.....	83 Hun, 610
<i>Judgment affirmed : 152 N. Y. 128.</i>	
STAFF v. LOEWER'S GAMBRINUS BREWING Co.....	1 App. Div. 405
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<i>Judgment affirmed : 152 N. Y. 87.</i>	
STEVENS v. MELCHER.....	80 Hun, 514
<i>Judgment of the General Term modified as directed in the opinion, and as modified, affirmed : 152 N. Y. 551.</i>	
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<i>Judgment affirmed : 151 N. Y. 671.</i>	
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<i>Judgment affirmed : 152 N. Y. 257.</i>	
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<i>Judgment affirmed on opinion below : 153 N. Y. 671.</i>	
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<i>Appeal dismissed : 152 N. Y. 649.</i>	
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<i>Judgment affirmed : 151 N. Y. 282.</i>	
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<i>Judgment and order affirmed : 151 N. Y. 463.</i>	
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<i>Appeal dismissed : 153 N. Y. 654.</i>	
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<i>Judgment affirmed : 152 N. Y. 121.</i>	
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<i>Order reversed and matter remitted to the Appellate Division, there to be reheard and determined : 152 N. Y. 69.</i>	
VAN DUZER v. ELMIRA, ETC., R. R. Co.....	75 Hun, 487
<i>Judgment affirmed on opinion below : 152 N. Y. 634.</i>	
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<i>Motion to dismiss appeal granted upon default : 151 N. Y. 644.</i>	
VAN WIE v. EMMONS.....	82 Hun, 614
<i>Judgment affirmed : 152 N. Y. 635.</i>	
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<i>Judgment affirmed on opinion below : 151 N. Y. 673.</i>	

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<i>Judgment affirmed : 152 N. Y. 191.</i>	
WARD v. METROPOLITAN EL. R. R. Co.....	82 Hun, 545
<i>Judgment affirmed : 152 N. Y. 39.</i>	
WARD v. PRATT.....	2 App. Div. 616
<i>Judgment affirmed : 153 N. Y. 672.</i>	
WATERBURY v. TUCKER & C. C. Co.....	91 Hun, 638
<i>See 152 N. Y. 610.</i>	
WATROUS v. W. A. WOOD M. & R. M. Co.....	84 Hun, 607
<i>Judgment affirmed : 152 N. Y. 636.</i>	
WEST v. BUTTNER.....	80 Hun, 605
<i>Judgment affirmed : 151 N. Y. 626.</i>	
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<i>Judgment affirmed : 153 N. Y. 691.</i>	
WISE v. WISE Co.....	12 App. Div. 319
<i>Order affirmed : 153 N. Y. 507.</i>	
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<i>Judgment reversed : 151 N. Y. 598.</i>	
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<i>Judgment reversed : 153 N. Y. 214.</i>	

The attention of the profession is called to the fact that the Court of Appeals in many cases decide an appeal upon other grounds than those stated in the opinion of the court below.

The affirmance or reversal of the judgment of the Appellate Division does not necessarily show that the Court of Appeals concurred in, or dissented from, the statements contained in the opinion of the Supreme Court. (*Rogers v. Decker*, 131 N. Y. 490.)—[REF.]

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DETERMINED IN THE

SECOND DEPARTMENT

IN THE

APPELLATE DIVISION,

July, 1897.*

THE PEOPLE OF THE STATE OF NEW YORK ex rel. JAMES I. VAN SICKLE, Relator, v. JACOB O. AUSTIN and Others, Composing the Election Board of the Town of Minisink, Respondents.

Polls at town meetings need not be kept open continuously from sunrise to sunset — a town election board acts ministerially — its acts are not reviewable by certiorari.

The provisions of the statute relative to town meetings (1 R. S. 342, § 16 [Chap. 569 of 1890]) do not require that town meetings shall be kept open, for the purpose of voting, continuously from sunrise to sunset, and such a meeting is not rendered illegal by the fact that the polls were not opened until nine o'clock in the forenoon, they continuing open, except for the noon hour, until sunset. An objection of this character cannot be raised by a writ of certiorari issued to review the proceedings of the town election board, as its determination in the premises is not judicial in its character, and, in the absence of an allegation, in the petition for the writ, of some judicial action upon the part of the town election board, the court must assume that all its acts were ministerial and administrative, and, therefore, not reviewable by a certiorari issued under section 2120 of the Code of Civil Procedure.

CERTIORARI issued out of the Supreme Court, and attested the 13th day of April, 1897, directed to Jacob O. Austin and others, composing the election board of the town of Minisink, commanding them to certify and return to the clerk of the county of Orange all and singular their proceedings had in conducting the annual town meeting held in the town of Minisink, in the county of Orange, on the 2d day of March, 1897.

*The other cases of this term will be found in volume 19 App. Div.—[REP.

Wilton Bennet, for the relator.

T. S. Hulse, for the respondents.

BRADLEY, J.:

The charge made by the petition of the relator is that the annual town meeting, held in the town of Minisink, was illegal in its result announced by the election board, because the polls were not open during the requisite time, in that the polls were not opened at sunrise and kept continuously open until sunset. And reference is made to the statute, which provides that: "Town meetings shall be kept open for the purposes of voting in the daytime only, between the rising and setting of the sun." (Laws of 1890, chap. 569, § 29.) It appears that the polls were opened at nine o'clock in the forenoon and continued open from that time until sunset, except one hour, from twelve o'clock noon until one o'clock P. M. Unlike the statutory direction applicable to general elections, the statute in question does not, in express terms, provide the hour or time the polls shall be opened, or that "there shall be no adjournment or intermission until the polls are closed." (Laws of 1896, chap. 909, § 3.) The language of the provision of the present statute as to the time that town meetings shall be kept open for purposes of voting, is substantially no different than it has been for upwards of eighty years. (2 R. L. 127; 1 R. S. 342, § 16.) And it never has been so construed as to require that the polls of town meetings be opened at sunrise or continuously kept open until sunset, as contended by the learned counsel for the relator. But the contrary has been held by the courts. (*Goodel v. Baker*, 8 Cow. 286; *The People ex rel. Simonson v. Martin*, 5 N. Y. 22.) This view of the interpretation of the statute disposes of the question of legality of the town meeting adversely to the contention of the relator.

There is a further reason why the writ cannot be supported, and that is in the fact that a certiorari is available only to review a determination judicial in character. The functions of the election board of a town in receiving votes and announcing the result are not judicial. In doing that, they do not necessarily have any discretion to exercise or any determination to make. They receive the votes, count them, and return the results which the figures produce. There is no allegation in the petition of any judicial action of the defend-

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ants, nor does anything of that character appear in their return. It cannot, therefore, be assumed that any acts performed by them, as such board, were other than such as may be denominated ministerial and administrative. And, therefore, they are not the subject of review by the writ issued herein. (Code Civ. Proc. § 2120; *The People ex rel. Corwin v. Walter*, 68 N. Y. 403; *The People ex rel. Second Ave. R. R. Co. v. Board Comrs., etc.*, 97 id. 37; *The People ex rel. Trustees, etc., v. Board of Supervisors*, 131 id. 468; *In re Many*, 10 App. Div. 451.)

The writ of certiorari should be quashed.

All concurred.

Writ of certiorari quashed, with ten dollars costs and disbursements.

JACOB BRENNER and ANNIE F. DOYLE, as Executors, etc., of
ELLEN McMAHON, Respondents, v. ALICE McMAHON, Appellant,
Impleaded with Others.

Complaint in foreclosure — allegations showing that executors have legal capacity to sue.

Where the complaint in an action brought by executors to foreclose a mortgage belonging to the estate of their testatrix, after stating the execution and delivery of the bond and mortgage to their testatrix, a default in payment, the date and place of her death, the admission of her will to probate by, and its record in the office of, the proper surrogate, further alleges "That in and by said last will and testament the said Ellen McMahon (the testatrix) duly appointed these plaintiffs to be the sole executors and trustees thereof, and on the said 15th day of February, 1896, letters testamentary were duly issued to these plaintiffs, who had duly qualified as such on the same day," it sufficiently appears from the complaint that the plaintiffs have legal capacity to sue, although there is no specific allegation that the plaintiffs were appointed, or that letters were issued to them, by any surrogate.

APPEAL by the defendant, Alice McMahon, from an interlocutory judgment of the County Court of Kings county in favor of the plaintiffs, entered in the office of the clerk of the county of Kings on the 25th day of May, 1897, upon the decision of the court, rendered after a trial before the court without a jury, overruling her demurrer to the complaint.

John McCrone, for the appellant.

Jacob Brenner, for the respondents.

BRADLEY, J.:

The action, as appears by the complaint, was brought in the County Court of Kings county for the foreclosure of a mortgage of date March 20, 1895, made by John McMahon to the plaintiffs' testatrix (who at the time of her death was the wife of the mortgagor), upon certain real property situated in that county, to secure the payment of \$14,000, with interest, on the 20th day of March, 1896, according to the condition of his bond of the like effect and of the same date.

The plaintiffs alleged the execution and delivery of the bond and mortgage by the defendant John McMahon to the plaintiffs' testatrix and his default in payment; and further alleged that "on the eighth day of February, 1896, the said Ellen McMahon died at the city of Brooklyn, leaving a last will and testament, dated February 3, 1896, which was duly admitted to probate by the surrogate of the county of Kings on the 15th of February, 1896, and is recorded in the office of said surrogate in Liber 212 of Wills, page 362. That in and by said last will and testament the said Ellen McMahon duly appointed these plaintiffs to be the sole executors and trustees thereof, and on the said 15th day of February, 1896, letters testamentary were duly issued to these plaintiffs, who had duly qualified as such on the same day."

The appellant's demurrer to the complaint is: (1) That the court has no jurisdiction of the person of the defendants; (2) that the complaint does not state facts sufficient to constitute a cause of action; (3) that the plaintiffs have not legal capacity to sue. The first ground is disposed of by the allegation to the effect that the mortgaged premises are situated in the county of Kings. (Code Civ. Proc. § 340, subd. 1.) The bond or obligation of the defendant John McMahon, his mortgage as a security for the payment of the amount and his default are sufficiently described and alleged for the purpose of the relief sought.

The main question urged on the part of the defendant arises upon the allegation relating to the appointment of the plaintiffs as executors and their authority to assume that relation in this action.

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The making and the probate of the will of the testatrix are well alleged, as is the fact that by it she appointed the plaintiffs to be the executors thereof. The averments which then follow, that letters testamentary were duly issued to those plaintiffs, who duly qualified, were, in the view taken of them, sufficient to the effect that they were clothed with the authority of that relation. Executors derive their authority from the will of their testator. (*Hartnett v. Wandell*, 60 N. Y. 346.) But the evidence of it is dependent upon the probate of the will and the issuance to them of letters. Before that is done, they have, in this State, no power to dispose of any of the estate except to pay funeral charges, nor to interfere with it further than is necessary for its preservation. (2 R. S. 71, § 16.) And every person named in a will as executor, and not named as such in the letters testamentary, is deemed to be superseded thereby. (Id. § 15.) It is, therefore, necessary, in support of the authority of an executor, to do any act as such beyond what is necessary to preserve the estate of his testator and the appropriation of that required for funeral expenses, to have letters.

In this case it is alleged that letters testamentary were duly issued to the plaintiffs, and that they had duly qualified as such on the day named. The insistence of the defendant's counsel is to the effect that there is no allegation that they were appointed as executors, in any proceeding before the court, by any surrogate, or by the determination of any surrogate, or that letters testamentary were duly issued by any surrogate. It is true that the averments as to the letters are not as full and complete as they very properly may have been, but, taken with the allegations relating to the making of the will, appointing the plaintiffs as executors, and the admission of the will to probate by the surrogate of Kings county, those which, in that connection, followed to the effect that letters testamentary were duly issued to them, and that they duly qualified, have the requisite support to render them effectual. (Code Civ. Proc. § 532.)

The case of *Secor v. Pendleton* (47 Hun, 281) does not necessarily apply to the question here. The averment there, that letters of administration were duly granted to the plaintiff, etc., was barren of support by any allegation that the intestate died having property in the State, or that letters of administration had been issued upon

his estate by any surrogate having authority within this State. There is a difference in the source of power of an executor and an administrator. While the former derives his power from the will, the latter, in his relation as such, is created by the court and derives his authority from the law. His appointment is dependent upon a situation and a state of facts to be made to appear in a proceeding instituted for the purpose. In the present case, the letters testamentary, alleged to have been duly issued, were legitimately the result of the alleged admission of the will to probate by the surrogate of Kings county on the same day. And the construction of the allegations, fairly permitted and required, is, that the letters were issued in the same proceeding in which the will was admitted to probate.

These views lead to the conclusion that the interlocutory judgment should be affirmed, with leave to the appellant to answer on payment of costs.

All concurred.

Interlocutory judgment affirmed, with costs, with leave to appellant to answer within twenty days, on payment of costs of demurrer and of this appeal.

SAMUEL KOCH and Others, Respondents, v. EUGENE V. N. BISSELL,
Appellant.

Charging a husband with necessities furnished to his wife — a subsequent letter of the wife is inadmissible.

Where an action is brought to charge a husband with necessities alleged to have been furnished by the plaintiffs to his wife, a letter written to them by the wife, after the purchases had been made, asking them to "look to" her husband and not to herself for the payment of the bill, is inadmissible, both as being a mere declaration of the wife not connected with the purchase or delivery of the goods, and as being insufficient to show, as against the husband any delivery of the goods.

APPEAL by the defendant, Eugene V. N. Bissell, from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of Kings on the 11th day of

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February, 1897, upon the verdict of a jury, and also from an order entered in said clerk's office on the 11th day of February, 1897, denying the defendant's motion for a new trial made upon the minutes.

James J. Allen, for the appellant.

James W. Ridgway, for the respondents.

BRADLEY, J.:

Action to recover for hats, furs, ribbons and other dress goods furnished by the plaintiffs to Mrs. Bissell, wife of the defendant, for her use. The defendant and his wife were living together. There is evidence tending to prove that he had been in the habit of paying bills for goods purchased by his wife, and whether those in controversy came within such as might, in view of the station in life of the husband and wife, be deemed necessities and suitable for her, and whether his custom had been to permit her to make purchases for herself and to pay the bills himself, were questions of fact fairly submitted to the jury. And while the evidence permitted the jury to find these facts in the affirmative, it did not require that conclusion.

The difficulty in the way of sustaining the recovery arises upon the exception taken by the defendant to the reception in evidence of a letter written by the defendant's wife to the plaintiffs after the purchases were made, to the effect that she had been called upon by the plaintiffs' collector; that her husband would have to settle the bill; that she had no money except what he let her have, and that it had been so small in amount for the past few months as to render it impossible for her to pay bills, and added, "kindly look to him for same, not me." This letter was her mere declaration, distinct from the transaction of the purchase or delivery of the goods and clearly incompetent as evidence. The statement of the trial justice in the charge to the jury, that the letter was put in evidence solely to show the delivery of the goods, and that the jury were not to take it as proof of any of the statements of fact contained in it, did not necessarily cure the error. The evidence was not stricken out. (*Mandeville v. Guernsey*, 51 Barb. 99.) Nor was it competent, as evidence against the husband, to show the

delivery of the goods. It cannot be seen that the reception of the letter in evidence may not have had an effect prejudicial to the defendant.

And, therefore, the judgment and order should be reversed and a new trial granted, costs to abide the event.

All concurred.

Judgment and order reversed and new trial granted, costs to abide the event.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. THOMAS B. MCGUIRE, Appellant, v. THE BRICKLAYERS' BENEVOLENT AND PROTECTIVE UNION of the City of Brooklyn, W. D., Respondent.

Demurrer to a return to an alternative writ of mandamus — the sufficiency of the writ is put in issue thereby — application for restoration to full membership in a trades union, which does not state that the relator has been expelled — denial, in a return, of knowledge or information.

An alternative writ of mandamus has the character of a complaint in an action ; it must state the facts which constitute the cause of the grievance of the relator, and is subject to a demurrer when no sufficient cause appears.

A demurrer to a return to a writ puts in issue the sufficiency of the writ itself.

Where the proof in support of such a writ, procured by a member of a trades union, alleges, in substance, that the union has refused to accept his dues because he has failed to pay a fine imposed upon him, and for the same reason has declared a "strike" against him by which he lost work ; that a committee of the international union, of which he is a member, has, as he has been informed, decided adversely to him, upon his application for his restoration to his rights in the local union, and there is no statement of the effect which this latter determination may have, nor any allegation that he has been expelled from or has ceased to be a member of the local union, there are no facts stated sufficient to justify the issue of an alternative writ of mandamus requiring the local union to reinstate the relator to complete membership, or to show cause to the contrary.

A return made to an alternative writ of mandamus, which denies any knowledge or information sufficient to form a belief as to the matters set forth in the writ, puts such matters in issue.

APPEAL by the relator, Thomas B. McGuire, from an interlocutory judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Kings on the 30th day

of December, 1896, upon the decision of the court, rendered after a trial at the Kings County Special Term, overruling his demurrer to the defendant's return to the writ of mandamus issued in the action.

Francis A. McCloskey, for the appellant.

Isaac M. Kapper, for the respondent.

BRADLEY, J. :

An alternative writ of mandamus has the character of a complaint in an action, and must in like manner be deemed to state the facts constituting the cause of relator's grievance, and it may be demurred to with like effect. (Code Civ. Proc. § 2076.) The demurrer of the relator to the defendant's return subjects the writ to criticism for the purpose of seeing whether it states facts sufficient to support the relief sought. If it does not, his demurrer to the defendant's return will require no consideration. (*People v. Baker*, 35 Barb. 105; *People v. Booth*, 32 N. Y. 397; *Genet v. Kissam*, 21 J. & S. 43; *Willover v. First National Bank*, 10 Civ. Proc. Rep. 80.) The mandate expressed in the writ is that the defendant reinstate the relator into its complete membership, or show cause to the contrary thereof. This is upon the theory that the relator has been illegally deprived of that relation to the defendant.

The question, therefore, arises whether all the facts essential to the support of that assumption are set forth in the writ. (*People ex rel. Egan v. The Columbia Club*, 20 Civ. Proc. Rep. 319.) It is there stated that the relator was duly admitted to membership of the defendant about twenty years ago. No averment is made that he has been expelled from such membership, or that he has ceased to be a member of the defendant. The relator does by this writ state that he has continuously remained such member except as thereafter set out. He then proceeds to state that in July, 1887, he tendered dues to the defendant's financial secretary, by whom he was informed that a fine of five dollars had been imposed upon him, and that the secretary had been ordered to collect it from the relator before receiving any dues from him; that the secretary refused to inform the relator as to such fine further than to declare that it must be paid; that there-

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upon and thereafter the "relator, as of right he could do, lawfully refused to pay said fine until first informed as to the cause and authority for levying the same; that thereafter, and until the latter part of November, 1887, relator attended the meetings of said corporation and took part therein without protest or objection by said corporation; that during all said time the financial secretary persistently refused to accept any dues from relator, although the same were duly and regularly tendered to him by relator;" that in the latter part of November his dues were paid to and accepted by the financial secretary up to that time; that in February, 1888, the relator tendered dues to and was informed by the defendant's financial secretary that there was a fine of five dollars against him, and that no dues would be received from him until the fine was paid; that the relator, making inquiry and being unable to obtain any information as to the cause of the fine, or of the authority for imposing it, refused to pay the fine until he should receive such information; "that about the month of June, 1888, a strike was, by said corporation, illegally ordered against relator, by reason whereof relator was idle" for two months; that the only reason why, at that or any other time, the relator was in arrears for dues was that he refused to pay a fine as to the cause of which he could obtain no information; that on or about the 6th day of August, 1888, the dues of the relator, up to that time, were paid to, accepted and retained by the defendant; "that since said last-mentioned date no dues have been accepted by said corporation from relator," although they have been frequently tendered. The effect or consequence of such refusal to accept dues from the relator, upon his relation to the defendant, is not stated in the writ. But the further statement is made that, on or about January 12, 1895, the relator duly presented to the Bricklayers and Masons' International Union of America (of which the defendant was a member) a petition praying that such action might be taken as was proper for his restoration to his rights as a member of the defendant; that the international union illegally referred such appeal to an executive committee, which committee, on or about June 11, 1895, notified the relator to attend before it at a time specified, which he did, and that he has been informed by some of the members of the committee that the determination was adverse to him; that the relator has never been

served with any written charges against him for violation of any of the provisions of the constitution or by-laws of the defendant, or of the international union, or for anything whatever; that he objected to the hearing by the committee for want of jurisdiction, and that the international union had no right to delegate such power to a committee.

It does not appear what was the particular subject of the appeal to the international union, or what was the nature of the determination adversely to the relator. No implication necessarily arises from the matters alleged in the writ that he was expelled from the defendant. And for aught that appears by allegation he is still a member of the union. In a pleading the facts relied upon to constitute the cause of action or defense, and essential to it, must be alleged. They cannot be inferred for the purpose and in support of the pleading, when implication, as matter of law, does not require it. (*Page v. Boyd*, 11 How. Pr. 415; *Magauran v. Tiffany*, 62 id. 251; *Rodi v. President, etc., Rutgers Fire Insurance Co.*, 6 Bosw. 23; *Tovey v. Culver*, 22 J. & S. 404.) The facts stated in the alternative writ do not seem to support the claim to the relief sought by it. In the cases cited by the learned counsel for the relator, the persons seeking relief had been suspended or expelled from the associations there referred to, and the questions for determination were whether they had illegally been deprived of or denied that relation.

The matter of damages is entitled to no consideration in this action or proceeding independently of its mandatory purpose, to which the question of damages is merely incidental. (Code Civ. Proc. § 2088.)

These views lead to the conclusion that the demurrer was not well taken. But, proceeding further, we think the return itself is not open to the criticism sought to be founded upon the demurrer. The objection that denial by the return, of any knowledge or information sufficient to form a belief of matters set forth in the writ does not put such matters in issue, is not tenable. Generally, statements upon information and belief in affidavits in opposition to a motion including that for peremptory mandamus, are not effectual to defeat the motion founded upon positively sworn statements. That rule or reason is not applicable to proceedings instituted by an

alternative writ of mandamus. Then the issues are to be presented and tried as are those of actions. (Code Civ. Proc. §§ 500, 2077; *People ex rel. McMackin v. Bd. of Police*, 46 Hun, 296; *People ex rel. Neftaniel v. Order Am. Star*, 21 J. & S. 66.)

In the view taken of the case, it is unnecessary to expressly refer to all the objections urged to the return, since the demurrer cannot be sustained upon any of them.

The interlocutory judgment should be affirmed.

All concurred.

Interlocutory judgment affirmed, with costs, with leave to the relator to amend alternative writ within twenty days, on payment of costs of demurrer and of this appeal.

THE VILLAGE OF ARVERNE-BY-THE-SEA, Plaintiff, v. EDWARD D. SHEPARD and AUGUST T. POST, Defendants.

Village bonds — when expenditures are “extraordinary.”

On June 12, 1897, village bonds, when authorized by a vote of the electors of a village, for “extraordinary expenditures” of the village, mentioned in section 4 of title 4 of chapter 291 of the Laws of 1870, as amended by chapter 131 of the Laws of 1884 and in chapter 879 of the Laws of 1895, might be issued, for any village purpose, where the amount of the expenditure was in excess of the limit of amount (\$500) imposed, by section 3 of title 4 of chapter 291 of the Laws of 1870, as amended by chapter 400 of the Laws of 1893, upon the village trustees in making “ordinary expenditures.”

SUBMISSION of a controversy upon an agreed statement of facts, pursuant to section 1279 of the Code of Civil Procedure.

John J. Lenehan, for the plaintiff.

Appleton L. Clark, for the defendants.

BRADLEY, J.:

The subject of the controversy relates to the power of the plaintiff as a municipal corporation to incur the liability represented by its bonds of the par value of \$113,000, issued in June last. Following an affirmative majority vote at a village election, held on the

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fifth of that month, upon resolutions presented, the trustees having issued the bonds, sold them at public sale to the highest bidder on June 12, 1897, for \$131,788.75, pursuant to notice of sale duly published. Such bidder was William E. R. Smith, and the bonds were duly awarded to him, who deposited the sum of \$2,000 on account thereof. Subsequently Smith, with the consent of the plaintiff's trustees, duly transferred to the defendants his proposal, bid and contract for the bonds, together with his deposit of \$2,000, and they, for a valuable consideration, took and assumed all the rights, agreements and liabilities of Smith thereunder. The bonds, duly executed, were tendered by the plaintiff to the defendants, and payment of the balance of \$129,788.75 and accrued interest demanded, and they declined to accept the bonds or to pay the balance of the purchase price therefor upon advice of attorneys that the village authorities had no power to borrow money and issue bonds for the purposes mentioned in the resolution (referred to as "extraordinary expenditures"), within the meaning of the provisions of chapter 291 of the Laws of 1870, and the acts amendatory thereof and supplementary thereto. It, therefore, seems that the power to issue the bonds under that statute was dependent upon the fact that the purposes for which the plaintiff, through the action of its trustees, sought to incur such liability and issue such bonds came within the meaning of extraordinary, as distinguished from ordinary, expenditures for which bonds might be issued under the provisions of such statute. "If this question is answered in the affirmative then judgment is to be rendered in favor of the plaintiff, directing the defendants to accept said bonds and pay to plaintiff the balance of the contract price." Otherwise, judgment is to be rendered in favor of the defendants and directing the return to them of the sum so deposited. This is the only question submitted by the parties to the court.

The plaintiff since the year 1895 has been a municipal corporation. It was created and organized as such pursuant to the provisions of the act entitled "An act for the incorporation of villages," passed April 20, 1870, and the acts amendatory thereof and supplementary thereto. The statute provided that "the expenditures of the village shall be denominated 'ordinary expenditures' and 'extraordinary expenditures.'" (Laws of 1870, chap. 291, tit. 4,

§ 1.) “‘Ordinary expenditures’ shall be those necessarily incurred to carry out and enforce the rules, by-laws and ordinances which the trustees are authorized to adopt by title 3 of this act, and to give force to the powers therein conferred, except as such expenditures may be specifically enlarged or diminished or controlled by other provisions of this act.” (Id. § 2.) “No ordinary expenditure for any one specific act, object, purpose or thing, except the lighting of streets, shall exceed the sum of five hundred dollars.” (Id. § 3, as amended by Laws of 1893, chap. 400, § 1.) The statute also provided that “the trustees shall have power to raise money for an extraordinary expenditure for any village purposes by assessment and tax, by submitting a resolution stating the amount to be raised,” etc., “to the annual election or to a special election of the legal electors entitled to vote,” etc., and upon an affirmative majority vote they might proceed in the manner provided, and when such resolution provided for raising the same in installments, the trustees might issue bonds of the village for the amount of such installments, payable respectively when such installments were to be raised, with interest not exceeding six per cent per annum. Provision was also made for the manner of selling the bonds, and that they should not be sold for less than par. (Id. § 4, as amended by Laws of 1884, chap. 131, § 1, and id. § 5, as amended by Laws of 1895, chap. 879.) There is no question here relating to the regularity of the proceedings taken to their result in issuing the bonds and selling them, and it is conceded that the statute in those respects was strictly pursued, and that such result was legal and the bonds valid, if the object and purpose of the liability thus created was to raise money for extraordinary expenditures within the meaning of the statute. The purposes sought by the creation of the obligation of the village were: (1) The making and improvement of streets in the village; (2) the making and improvement of sidewalks in the village; (3) the construction of a sluice for sewerage purposes; (4) the condemnation for the acquisition of the right to construct such sluice or drain; (5) the opening and extension of Ocean avenue, and (6) constructing culverts and drains.

Those contemplated improvements were for village purposes, and in that sense they came within those which may be denominated “extraordinary expenditures,” and yet, if they had not exceeded

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the limitation in amount, they or some of them would have come within such as might have been deemed ordinary expenditures. By reference to the statute, it is seen that the powers of trustees of villages were quite specifically recited. (Laws of 1870, chap. 291, tit. 3, § 3, subd. 25, as amended by Laws of 1893, chap. 212.)

It is suggested and urged on the part of the defendants that the class denominated extraordinary was distinguished in nature from that of ordinary expenditures. If that view is supported, the bonds in question were issued without authority. In *Allen v. The Village of Northville* (39 Hun, 240) Mr. Justice LEARNED said: "It is not the *amount*, but the *nature* of the expenditure which makes it 'ordinary.'" Such remark was unnecessary to the result. And Mr. Justice BOCKES, in a concurring opinion, expressed a contrary view, and said: "If in excess of this sum (\$500), the expense was an 'extraordinary expenditure.'"

This, in view of the statute, as shown by its provisions, seems to be the reasonable and necessary meaning of that term. Both classes of expenditures were for village purposes, and, as has been observed, the statute expressly provided that the extraordinary expenditures might be made "*for any village purposes.*" There does not appear to be any statutory limit in the nature, occasion or purpose of the expenditure, to render them extraordinary, further than that they be made for village purposes. And to hold that the distinction between the two classes of expenditures, within the contemplation of such statute, was in their nature and not in the amount, would render the provisions of the statute relating to extraordinary expenditures substantially nugatory. The trustees, as administrative officers of the municipal corporation, were vested with certain powers, among which were necessarily some to enable them to raise money for its general purposes. But upon this there was a limitation to what may be termed ordinary expenses. It was contemplated by the Legislature that something beyond this limit upon the power of the trustees would become necessary, and it was, therefore, provided that the people of the village, entitled to exercise the right, should, by a majority vote, be permitted to authorize a larger expenditure within and for the purposes specified. This, within the meaning of the statute, constituted an extraordinary expenditure as distinguished from the ordinary one. It was rendered so without

reference to its nature, but because it was an expenditure thus provided for beyond the limit in amount prescribed for that which the trustees might provide for without the direction or authority derived from the majority vote of their constituency, taken in the manner prescribed by the statute. No further discussion of this question seems necessary. The court is called upon, by the matter submitted, to answer the single question, and if it is determined in the affirmative to direct judgment for substantially the specific performance of the contract of sale and purchase of the bonds, which contract appears by the agreed statement of facts to have been made and partially performed on June 12, 1897. The time of the making of such contract is particularly referred to, because the provisions, original and amendatory, of the general act relating to the incorporation of villages, as they were prior to and up to the 1st day of July, 1897, then ceased to exist, and were repealed by the Laws of 1897 (Chap. 414), now known as "The Village Law."

If the contract for the sale and purchase of the bonds was effectually made, as is assumed by the parties in the statement of facts presented here, then the obligation created by it was not impaired by the repeal of the statute under which the bonds were issued. (Const. U. S., art. 1, § 10.) We deal only with the question which the parties have seen fit to submit to the court for determination. The views upon the facts presented lead to the conclusion that the question submitted should be answered in the affirmative, and that judgment be directed accordingly in favor of the plaintiff, without costs.

All concurred.

Judgment for plaintiff on agreed statement of facts, without costs.

ISAAC E. BARNES, Respondent, v. EDWARD V. LOEW, Appellant.

Contract to supply a windmill and water tower—their failure to supply the house with water — charges of the judge.

Where, in an action brought by a contractor to recover the price of an apparatus which was designed to supply with water the house of the defendant, but failed to do so, the testimony is conflicting as to the cause of the failure, and the court, upon the trial of the action, charges the jury that the plaintiff must prove substantial compliance with the contract in order to recover, and that if the jury believed that the plaintiff did not put the tank and tower in good substantial working order under the contract they must find for the defendant, and then, without exception by the defendant, adds, that as the court reads the contract, there is no guaranty by the contractor that the plant will produce any certain result, and that if the contractor has fulfilled the specifications, he has performed the contract and is entitled to his money, a verdict rendered in favor of the contractor must be allowed to stand.

APPEAL by the defendant, Edward V. Loew, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Rockland on the 4th day of December, 1896, upon the verdict of a jury, and also from an order bearing date the 30th day of November, 1896, and entered in said clerk's office, denying the defendant's motion for a new trial made upon the minutes.

This action was brought to recover the contract price of a well, pump and windmill erected by the plaintiff upon the defendant's premises.

Abram A. Demarest, for the appellant.

William McCauley, Jr., for the respondent.

GOODRICH, P. J. :

On July 23, 1896, the plaintiff and defendant entered into the following contract :

"The party of the first part (plaintiff), for and in consideration of the sum of three hundred and fifty dollars (\$350), to be paid by the party of the second part (defendant), agrees to do the following work and supply the following materials, viz. : To drill a well on the premises of the party of the second part situated

north of Nanuet; said well to supply at least 1,000 gallons of clear water within eight hours daily; to supply a suitable pump for well and a windmill with fifty-foot tower with tank of 1,000 gallons capacity, set in tower at a distance of 16 feet or more from the ground to give sufficient force to supply house with water, to supply 70 feet of $1\frac{1}{4}$ in. iron pipe. The party of the first part further agrees to connect and put in working order the above-mentioned apparatus and guarantee the supply of water hereinbefore mentioned."

Subsequently the plaintiff drilled the well, erected the windmill, made the pipe connections, procured a fifty-foot tower with a tank of 700 gallons capacity, which was accepted by the defendant in place of the 1,000 gallon tank named in the contract. There is no question raised by the defendant as to the sufficiency of the well, but there is a question as to the suitability of the pump and the capacity of the windmill to raise water into the tank; and it is apparent from the evidence that the apparatus, taken as a whole, does not actually supply the house with water, and that there is some defect either in the original construction or the subsequent condition. The testimony as to the cause of this failure is quite conflicting.

The plaintiff produced evidence of the proper construction of the apparatus, while the defendant seems to have been contented to produce evidence showing the failure of the apparatus to do its work in supplying the house with water. The learned court charged: "As I read this contract there is no guarantee on the part of Mr. Barnes that this plant would produce any certain result. He simply agrees to put up a tower so high, put in a tank so many feet from the ground and of such a capacity, put in a pump and to dig [a] well which shall produce a certain number of gallons of water a day. Now, if he has performed all those specifications he has performed his contract and is entitled to his money." To this portion of the charge there was no objection; and the court, in the body of the charge and at the request of the defendant, stated that the plaintiff could not recover anything unless he had substantially complied with the contract, and that if the jury believed that the plaintiff did not put the tank and tower in good substantial working order under the contract they must find for the defendant. The jury found a verdict for the full amount of the contract price.

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It is sufficient to say that, whether or not this charge of the court was correct, the defendant acquiesced therein without exception and consequently no such question is now before us. I have carefully examined the testimony in the case, and am of the opinion that the submission of the questions of fact to the jury was proper and that there was sufficient evidence to support the allegations of the complaint.

The judgment should be affirmed.

All concurred.

Judgment affirmed, with costs.

FRANK BALDWIN, Respondent, v. WILLIAM KELLY, Appellant.

Contract to build a house—when abrogated by its modification—recovery as upon a quantum meruit.

Where the owner of a house, who has entered into an agreement with a contractor to build an addition to the house for a certain amount, subsequently commissions the contractor to increase the size of the extension and to replace the old house with a new and larger one, but fails to fix a price for the entire work, although he actually pays a sum for the work done exceeding the price named in the original agreement, that agreement must be considered as abrogated by the subsequent negotiation, and the contractor may recover as upon a *quantum meruit* for the work done.

APPEAL by the defendant, William Kelly, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Queens on the 14th day of November, 1896, upon the decision of the court rendered after a trial at the Queens County Special Term.

David K. Case, for the appellant.

H. A. Monfort, for the respondent.

GOODRICH, P. J. :

The action is brought to foreclose a mechanic's lien. The defendant was the owner of a house and lot at Rockaway Beach, and made a contract with the plaintiff to build an addition to the house already upon the lot. The parties differ in their testimony as to the

terms of the agreement. The plaintiff offered testimony tending to show that he had done work for the defendant before this time, and that they went together and staked out on the ground the dimensions of a building to be erected as an extension to the house already on the lot, and that for this work the defendant agreed to pay him \$3,500; that afterwards the defendant concluded to increase the size and character of the extension and, still later, to have the old house removed and a new and larger one built, and that he and the plaintiff together staked off the dimensions of the new house to take its place; that there was no price agreed upon for the entire work; that the defendant told him to go ahead and do the work; that the plaintiff removed the old house and built both the extension and new house, larger in depth, width and height than that originally intended.

The defendant offered testimony tending to show that the plaintiff agreed to build the entire structure and remove the old house for \$3,500.

The plaintiff offered in evidence a bill of particulars and testified to its correctness as to materials and labor. This bill included \$75 for painting a barn, \$50 for building a manure pit and \$70 paid for insurance premium, and these items are admitted by defendant to be correct. The total amount was \$5,864.27, upon which there had been paid by the defendant, in cash, \$3,789.32 and there was credited \$125 for a horse sold by the defendant to the plaintiff and \$350 as the value of the old house removed by the plaintiff. The balance of the bill was \$1,599.95.

The court found that the work was done at the request of the defendant, without mentioning in the findings any agreement fixing a price for any part of it; and that the work was worth \$5,494.32, on which the defendant had paid, including the old house — the value of which he found to be \$400 — the sum of \$4,244.32, leaving still due \$1,250, for which sum he gave the plaintiff a judgment.

The value of the work and materials having been proven by the plaintiff, the defendant omitted to give any testimony to disprove it. Each party, however, offered evidence to prove the value of the completed structure. The plaintiff's evidence showed the value to be from \$5,900 to \$6,200, and at the close of the evidence the defendant had offered no testimony as to the value of the work and mate-

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rials. The court suggested that there was no proof of such value, evidently referring to the defendant's failure to prove anything in regard to it, and that he must assume that it was worth what the plaintiff claimed; whereupon, the defendant's counsel stated that his client had only made one agreement with the plaintiff, viz., to pay him \$3,500 for the whole work. The court inquired whether he expected to get a house worth \$6,000 for \$3,500, and the counsel answered that the defendant had made an offer to submit the matter to two builders, and pay whatever was the difference in valuation. The court again suggested that the defendant ought to make some proof of value. Whereupon, the defendant called a witness who testified that the value was \$5,000.

I think that, upon all the evidence, the learned court was justified in finding that, although there was originally an agreement to put up the extension for \$3,500, this agreement was abrogated by the subsequent negotiation, and that there was no contract price fixed when the work began, but that the plaintiff was to be paid as for *quantum meruit*; and this is also confirmed by the fact that, during the transactions, the defendant paid the plaintiff in cash a sum considerably larger than the \$3,500. The plaintiff was, therefore, put to his proof as to the value of work and materials, and the value as stated by him was not contradicted by the defendant. The learned justice would have been justified in giving the plaintiff judgment for the difference between \$5,864.27, the value of work and material as proved, and the amounts of the credits, \$4,264.32, viz., \$1,599.25, but he was probably influenced by the evidence on both sides as to the value of the completed work, and consequently reduced somewhat his estimate of the value of the work and materials, of which finding only the respondent can complain.

Upon the evidence, we see no reason to review his conclusions, and affirm the judgment.

All concurred.

Judgment affirmed, with costs.

WINIFRED BRADLEY, Respondent, v. JOHN HANCOCK MUTUAL LIFE
INSURANCE COMPANY, Appellant.

Life insurance — waiver of non-payment of premiums — inference that a member has been reinstated — proofs of death are not conclusive as to the cause of death — effect of moving for the direction of a verdict.

Where a policy of insurance has lapsed because of a failure by the insured to make the required payments for a period of four weeks, and an application by the insured for reinstatement is received by the insurer and is not returned by it, and it subsequently accepts weekly premiums which exceed in amount the premiums due at the death of the insured, a waiver of the non-payment of the premiums for such period of four weeks may be inferred.

In such a case the insurer is put to proof of the fact that the member had not been reinstated — particularly where its denial of a reinstatement is made upon information and belief.

Proofs of death are only *prima facie* evidence of the cause of death.

After moving for the direction of a verdict, the insurer cannot insist, where he fails thereafter to ask that a question of fact be submitted to the jury, that there was conflicting evidence which should have been submitted to the jury.

APPEAL by the defendant, the John Hancock Mutual Life Insurance Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Orange on the 17th day of April, 1897, upon the verdict of a jury, and also from an order entered in said clerk's office denying the defendant's motion for a new trial made upon the minutes.

Leonard J. Langbein, for the appellant.

John W. Lyon, for the respondent.

GOODRICH, P. J. :

The action was brought upon an insurance policy issued in August, 1891, upon the life of Patrick Bradley, payable to his wife. At the same time three other policies were issued to members of the family; the weekly premiums upon the several policies were as follows:

Bradley, Ed. B., five cents; Bradley, Mary, five cents; Patrick Bradley, ten cents; Winifred Bradley, ten cents; total, thirty cents.

Bradley died November 17, 1896. The premiums were payable weekly and the premium receipt book provided that "all policies upon which premiums are over four weeks in arrears are out of bene-

fit." It was the custom of the insured to pay the premiums on all of the policies together in one sum. The company issued with the policies what is called a premium receipt book, one of which, commencing January 8, 1896, was produced in evidence. One column gives the weekly dates when premiums fell due, a second column the date when the premium was paid, a third the amount of premium and the fourth the collector's signature. This book, commencing on January 8, 1896, shows a number of payments which may be summarized as follows: The number of weeks from January 8, 1896, to November 11, 1896, are forty-five. There are entered in the book and receipted for by the collector of the company, payments on the four policies amounting to eleven dollars and sixty cents. There is also credited a dividend equal to ten weeks' premium on two of the policies, amounting to one dollar and fifty cents. There is also in evidence a letter from the secretary of the company, showing the receipt by him of one dollar and twenty cents. These sums amount in all to fourteen dollars and fifty cents, which is one dollar more than the amount of payment due at the time of the death of Patrick Bradley, who died on November 17, 1896, before another premium became due.

So far as appears by the book, however, there was no weekly payment made between September ninth and November sixth, and on October twenty-second the secretary of the company, who had received the one dollar and twenty cents above referred to, wrote Mrs. Bradley that the policy had lapsed, as no payment had been made for a period of four weeks, and that it would be necessary to have a health certificate signed and returned with ninety cents extra premium, when, if all were satisfactory, the company would reinstate the policy, holding meantime the receipt book and the one dollar and twenty cents which she had remitted. The insured made application for reinstatement, in which he said: "I, being the person insured, hereby make application for the reinstatement of said policy, and certify that I am in good health; that I have not consulted a physician since date when last payment was due as above; and I understand that said policy is not now in force, and is to be reinstated only on condition of the truth of the above statements; and that no liability is assumed by said company unless this application for reinstatement is accepted at its home office."

Subsequently, however, other payments were entered on the book, viz.: November sixth, two dollars and forty cents, and on November twenty-third, after the death of the insured, ten cents. After Bradley's death proofs of loss were presented by the plaintiff, in which it was stated that the deceased died of tuberculosis pulmonis with other complications, and that the duration of the disease had been four months.

The plaintiff at the trial offered in evidence the policy of insurance in suit, and rested without proving the death of Bradley, the same having been admitted by the answer. The defendant's counsel moved to dismiss the complaint, on the ground that the plaintiff had not shown the payment of the premiums; whereupon the plaintiff being recalled testified that she had paid the premiums continuously until the death of the insured and produced the premium receipt book above referred to. Upon her cross-examination the application for reinstatement was produced and offered in evidence by the defendant, and also the proofs of death before mentioned.

At the close of the evidence the defendant moved to dismiss the complaint on the ground that the payment of the premiums was not proven; that there had been an application for a reinstatement of the policy and that the same had not been granted; and that the proofs of loss showed that the insured had had tuberculosis pulmonis for four months previous to his death and, consequently, was not in good health at the time of the application for reinstatement of the policy. Both parties moved for a direction of a verdict, and the question is whether there was sufficient evidence to establish the payment of the premiums. It appeared clearly that there was a period of upwards of four weeks, viz., September ninth to November twenty-sixth, for which no premiums had been paid, and that one of the provisions of the receipt book, as stated above, is as follows: "All policies upon which premiums are over four weeks in arrears are out of benefit." Assuming for the moment that there had been a failure to pay premiums as claimed, and that the policy had lapsed, and that the company was justified in requiring an application for reinstatement, still, as it continued to receive weekly premiums, as shown by the receipt book and defendant's letter of October twenty-second, which exceeded the amount of premiums due on the day of Bradley's death, and continued to receive them after the receipt of

the application for reinstatement, the date of which is not given, but which must have been after October twenty-second, the date of the company's letter requiring it, the defendant waived the non-payment of the premiums during the period of four weeks above referred to.

The appellant claims, however, that the receipt of premiums was induced by the statements in the application for reinstatement that the insured was in good health and had not consulted a physician for four months, but the oral testimony of the plaintiff was that the insured was in good health and had not consulted a physician; that neither Dr. Leahy nor Dr. Meddrick attended him; that Dr. Leahy came to the house to see her sister, and that while there he had prescribed for her husband and given him some medicine, and that this was on the Friday before his death. There is some suggestion of his previous prescription for grippe, four or five months before his death, but this date is not very definite, and it was apparently more than four months before October twenty-second, and the plaintiff says her husband recovered his health after that, so that it is not at all clear that there was any consultation with a physician within the meaning of the term used in the application for reinstatement, "consulted a physician." She also testifies that she did not know Dr. Meddrick, had never heard of him, and that he did not attend the insured. This evidence becomes important in view of the proofs of death submitted by the plaintiff. There are two medical certificates. Dr. Leahy's certificate contains the following: "Date of first visit *or* prescription in last illness? Aug. 1, '96."

Dr. Meddrick's certificate says: "Date of your first visit *or* prescription in last illness? April 29th, '96. Did not attend him during last illness. Date of your last visit? July 18, 1896."

These statements are not inconsistent with the testimony of the plaintiff for the reason already adverted to. The most that can be said is that there was conflicting or inconsistent evidence which might have been submitted to the jury; but this the defendant waived by its request for the direction of a verdict and its failure thereafter to ask for a submission of the question of fact to the jury.

But it is also to be observed that the question in the medical certificate relates to "visit *or* prescription." The answers are not inconsistent with the plaintiff's testimony as to a prescription when Dr.

Leahy came to see her sister. It is true that the proofs of loss furnish some evidence of the facts therein stated, but, after all, they are only *prima facie* evidence and may be rebutted.

In *Chinnery v. The U. S. Industrial Ins. Co.* (15 App. Div. 515) it was held that, while proofs should have been admitted as evidence, they were not conclusively binding upon the plaintiff. See, also, to the same effect *Hanna v. Conn. Mut. Life Ins. Co.* (150 N. Y. 526); *Redmond v. Ind. Benefit Assn.* (Id. 167). To hold otherwise would be to put the beneficiary always at the mercy of the physician, whose diagnosis might be utterly unfounded or unreliable. The defendant might have produced and examined the physicians at the trial to establish the statements of the certificates, and cannot, in the face of the plaintiff's testimony and after moving for the direction of a verdict, rely upon the certificates to the extent of saying that they must necessarily overcome the positive testimony of the plaintiff.

It may also be said that, from the receipt by the company of the application for reinstatement and its failure to return it, and the acceptance of subsequent payments by the collector who had been in the habit of receiving premiums, the consent of the company to the reinstatement may be inferred; at any rate, we think, the company was put to its proof that it had not made such reinstatement. The evidence upon this subject was in its own possession, and the general rule is, that a party which sets up an affirmative defense and has the evidence in its possession, is bound to prove such fact affirmatively, rather than is the other party to prove the negative. This suggestion receives pointed force from the peculiar form of the answer, in which the defendant alleged, but only upon information and belief, that such application had not been accepted nor said policy reinstated.

In *Spencer v. The Citizens' Mutual Life Ins. Assn.* (142 N. Y. 505) the court held that the burden of proof is upon a defendant to establish an affirmative defense set up in an answer, and that this burden is not changed by the presentation of evidence which *prima facie* establishes the defense.

The learned court below was, therefore, justified in finding from the evidence that the premiums had been fully paid; that there was never any lapse of the policy; that the company was never in a

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position to require the insured to apply for a reinstatement; and that, on the whole evidence, the plaintiff was entitled to the direction of a verdict.

The judgment is affirmed.

All concurred.

Judgment and order affirmed, with costs.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. OWEN J. KAVANAGH, Relator, v. JOHN T. GRADY and Others, as and Composing the Board of Police Commissioners of Long Island City, Respondents.

An Appellate Division may, upon an appeal from an order denying an application for a peremptory writ of mandamus, grant the writ — to disregard a writ so granted is a contempt of court.

The provisions of section 2068 of the Code of Civil Procedure, enacting that a writ of mandamus cannot be granted except at a Special Term of the court, apply only to an original application for the writ, and have no effect upon section 1317 of the same Code, providing that an Appellate Division may reverse, affirm or modify any order appealed to it.

A failure to comply with the terms of a peremptory writ of mandamus, issued upon an order, made on appeal, by the Appellate Division, constitutes a contempt of court.

MOTION by the relator to punish the respondents for contempt of court for failing to comply with the provisions of a peremptory writ of mandamus issued by the Appellate Division of the second department.

William E. Stewart, for the relator.

George W. Stephens, for the respondents.

PER CURIAM:

We are of opinion that the objection to the regularity of the writ of mandamus served on the respondents, in that it was issued on the order of this branch of the court instead of by the order of the Special Term, is not well founded. The provisions of section 2068

of the Code of Civil Procedure, that a writ of mandamus can be granted only at a Special Term of the court, apply only to an original application for the writ. That section does not limit the effect of section 1317 of the Code, that on appeal the Appellate Division may reverse, affirm or modify any order appealed to it. The authority for the issue of a writ in this case was the order of this division, made on an appeal from an order denying the application for the writ. The order of this branch of the court required no action by the Special Term to give it full vitality and effect.

Defendants should be convicted of contempt and fined the sum of ten dollars and ordered to stand committed to the common jail of Queens county until they comply with the terms of the writ.

All concurred.

Defendants convicted of contempt and fined the sum of ten dollars, and directed to stand committed to the county jail of Queens county until they comply with the mandamus hitherto issued by this court.

In the Matter of Opening BAY TWENTY-THIRD STREET, between Eighty-Sixth Street and Benson Avenue, in the City of Brooklyn.

In the Matter of Closing DE BRUYN'S LANE, between Eighty-Sixth Street and Benson Avenue, in the City of Brooklyn.

FREDERICK SNYDER, Petitioner; THE CITY OF BROOKLYN, Respondent.

Brooklyn — liability of, for an award made in a street opening proceeding — effect on the obligation of the city of a charter provision that awards are to be paid pro rata from assessments as collected.

The amendment, made to the charter of Brooklyn by section 27 of title 18 of chapter 863 of the Laws of 1873, directing the city comptroller to "pay to a person to whom damage may have been awarded" in a report of commissioners appointed to open a street, "the amount of such damages, with interest at the rate of seven per cent per annum, from a day thirty days subsequent to the day of confirmation of the respective assessments, *pro rata*, as moneys on account of such assessments shall be received from the department of collection," was not intended to alter the ultimate liability of the city under the charter of

1854, to pay such awards, but is properly construed as requiring that, during the period prescribed for the collection of an assessment and before the assessment roll is turned over by the collector to the registrar of arrears, money received from the assessment is to be paid, *pro rata*, on the awards made to land-owners, and that, at the termination of that period, the city shall be forthwith liable to pay any awards then unpaid, whether in whole or in part.

MOTION by the petitioner, Frederick Snyder, to vacate and set aside orders of the Appellate Division in the second department, entered in the office of the clerk of the county of Kings on the 17th day of June, 1896, and on the 1st day of March, 1897, appointing commissioners to estimate the damages caused by the opening of Bay Twenty-Third street and by the closing of De Bruyn's lane.

Nathaniel H. Clement, for the motion.

Joseph A. Burr, opposed.

CULLEN, J. :

There is involved in this application but one question, whether by the present charter, the city of Brooklyn is bound to pay, either primarily or ultimately, awards for lands taken for street openings. If the city is not liable for such awards, then, undoubtedly, the charter provisions as to street openings are unconstitutional and void. For the landowner cannot be relegated to the assessment district as the sole source of payment of his award. (*Sage v. City of Brooklyn*, 89 N. Y. 189; *Mitchell v. The Village of White Plains*, 138 id. 627; *affd.*, 62 Hun, 231.)

The *Sage* case decided that under the charter, as it stood prior to 1873, the city was liable for such awards. The liability was placed on the provisions of section 16, title 4 of the charter of 1854 (Chap. 354): "The city comptroller shall pay to the persons or to the attorneys or legal representatives of such persons to whom damages may have been awarded in such report, the amount of such damages without any deduction therefrom by way of fee or commission." In 1873 this provision was amended so as to read: "The comptroller shall pay to the persons * * * to whom damage may have been awarded in such report, the amount of such damages, with interest at the rate of seven per centum per annum from a day thirty days subsequent to the day of confirmation of the respective assessments, *pro rata*, as moneys on account of such assessments

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shall be received from the department of collection." (§ 27, tit. 18, chap. 863.)

It is this amendment that gives ground for the present controversy. It is insisted by the counsel for the landowner that though the duty imposed on the comptroller to pay was, under the charter of 1854, absolute, it is since the amendment of 1873 only qualified, being limited to the receipt from assessments as the source of such payment. If the present section were an original one, with no history, this argument would be cogent, if not controlling. But in the light of previous legislation, and the custom which had prevailed in the city as to the payment of awards, we think it was not the intention of the Legislature by the amendment to affect the city's responsibility. Prior to the decision in the *Sage* case, the liability of the city to secure the payment of awards was considered a question of very grave doubt. *McCullough v. The Mayor* (23 Wend. 458) was regarded as an authority against such liability. It had been the practice in the comptroller's office to pay the landowners who first filed claims for their awards in that office the amount of their awards from the moneys received from the assessment. Thus, payment to the landowners who filed their claims later was deferred, and in some cases altogether denied. It was to correct this practice, and not to affect the question of the city's liability or non-liability for payment, that the statutory amendment was enacted. This is clearly pointed out by Judge EARL in his dissenting opinion in the *Sage* case, and is well known to all who are conversant with the municipal history of the city of that time. It is a cardinal rule that a statute should be so construed as to be constitutional instead of unconstitutional, if its terms permit of that result. To hold the amendment of 1873 as relieving the city from ultimate responsibility for awards to landowners, would render invalid all street openings which have been had since its enactment, and deny the city the power to make such improvements without further legislation. Certainly this is a result to be avoided, and we think that the amendment of 1873 should not be so construed as to effect that result, when it may be said to be a matter of common knowledge within the city that the amendment was enacted for no such purpose. We think that full effect can be given to the amendment of 1873 by holding, as suggested by the learned corporation counsel, that

during the period prescribed for the collection of the assessment, and before the assessment roll is turned over by the collector to the registrar of arrears, money received from assessments is to be paid *pro rata* on the awards to landowners, and that at the termination of such period the city is forthwith liable to pay any awards then unpaid, either in whole or part.

The motion should be denied, with ten dollars costs and disbursements.

All concurred.

Motions denied, with ten dollars costs and disbursements.

THE CITY OF BROOKLYN, Appellant, v. THE NASSAU ELECTRIC RAILROAD COMPANY, Respondent.

Street railroads — a consent of a common council that a street railroad may maintain a certain rate of speed, is subject to change — police power.

A stipulation, contained in the consent of the common council of a city to the construction of a street railroad operated by electricity, that the rate of speed should in no instance exceed ten miles per hour, is not available to the railroad company as a contract giving it the right thereafter to operate its cars at that speed.

The provisions of the Railroad Act (Laws of 1890, chap. 565, § 98), that the proper local authorities "may make such reasonable regulations and ordinances as to the rate of speed (or) mode of use of tracks * * * as the interests or convenience of the public may require," grant to a common council a continuous power to control the speed of street cars, and one common council cannot bargain away the rights of its successors to exercise such power.

Semle, that the rate of speed of cars in streets and highways cannot be made the subject of contract either by the Legislature or by the common council of a city, as the matter is within the police power of the State, and the Legislature cannot divest itself of such power.

APPEAL by the plaintiff, The City of Brooklyn, from a judgment of the County Court of Kings county in favor of the defendant, entered in the office of the clerk of the county of Kings on the 5th day of December, 1896, upon the decision of the court reversing upon appeal a judgment of a justice of the peace rendered in favor of the plaintiff.

Joseph A. Burr, for the appellant.

Henry Yonge, for the respondent.

CULLEN, J. :

This action was brought to recover a penalty for the violation of an ordinance of the city of Brooklyn, enacted in April, 1895, limiting the speed of street railroad cars to six and eight miles an hour in certain prescribed portions of the city. The case does not differ from that of *City of Brooklyn v. Brooklyn City & Newtown R. R. Co.* (11 App. Div. 168), but the respondent raises a point not considered in the former case.

The consent given by the city on June 30, 1893, to the construction of the defendant's road, which, both by the Constitution and the statute (Chap. 565, Laws of 1890), was a prerequisite to the acquisition of a complete franchise to build a street railroad, contained this provision :

"In the operation of its cars by electric power the said company may run them at such speed as shall enable it to secure to the public the advantage of better and more speedy transit, with due and proper regard to the safety of others using the public streets, but such rate shall in no instance exceed ten miles per hour."

It is now claimed that this condition constituted a contract with the defendant that it should always thereafter have the right to operate its cars at the rate of ten miles an hour.

First. We think this is not the true construction of the consent. In *Railway Co. v. Philadelphia* (101 U. S. 528) the appellant was incorporated under a special statute which provided, "the said company shall also pay such license for each car run by said company as is now paid by other passenger railway companies in the city of Philadelphia." At that time the license fee was thirty dollars. By a subsequent statute it was enacted that the license fee for all companies in the city of Philadelphia should be fifty dollars. The defendant claimed that its charter constituted a contract by which it was compelled to pay only thirty dollars a car, and that the subsequent statute could not impair its rights. The Supreme Court of the United States held that this contention could not be sustained. It was there said (p. 535): "The language of the act of incorporation referred to does not amount to a contract of any kind, and cer-

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tainly not to such a contract as that attempted to be set up by the defendants, * * * but it is plain that there is nothing in the language of the section to warrant the court in holding that the Legislature intended to contract that the license charged for such passenger cars should never exceed the annual sum of thirty dollars."

Second. The Railroad Act itself would seem to prohibit any such contract by the common council, for by section 98 it is enacted: "Such authorities (proper local authorities) may make such reasonable regulations and ordinances as to the rate of speed, mode of use of tracks * * * as the interest or convenience of the public may require." This power is plainly continuous, and one common council could not bargain away the right of its successors to exercise the power.

Third. We very much doubt whether the regulation of the rate of speed of cars in streets and highways could be the subject of contract either by Legislature or common council. It is settled law that the police power extends "to the protection of the lives, health and property of the citizens and to the preservation of good order and the public morals. The Legislature cannot, by any contract, divest itself of the power to provide for these objects." (*Beer Co. v. Mass.*, 97 U. S. 25; *Fertilizing Co. v. Hyde Park*, Id. 659; *Butchers' Union Co. v. Crescent City Co.*, 111 id. 746. See *N. Y. & N. E. R. R. Co. v. Bristol*, 151 U. S. 557.)

The case of *City of Burlington v. Burlington Street Railway Company* (49 Iowa, 144), relied on by the plaintiff's counsel, is not in point. It was there held that the city, having under proper authority granted the defendant the right to construct a double-track road on certain streets, a subsequent ordinance forbidding the construction of more than a single track on those streets was invalid. This court has held that where a high road, upon which a company has acquired a valid and complete franchise to construct a street surface railroad, was incorporated into a parkway, the company could not be deprived of its franchise or compelled to construct its railroad for the whole length of the highway through a tunnel. (*Coney Island, Fort Hamilton & Brooklyn R. R. Co. v. Kennedy*, 15 App. Div. 588.)

A franchise to construct and maintain a railroad is property.

The Legislature, by the grant or creation of such property, does not impair or limit the exercise by it of the police power. The presence of railroad cars on a highway may to some extent obstruct travel, the same as that of other vehicles, but of itself does not imperil life or limb. But an excessive rate of speed of any vehicles may constitute a serious menace to both. It is as much the duty of the Legislature to protect the traveler from unnecessary danger to his person while on the highway as his health from infection while in his house, and we think the power to perform neither obligation can be contracted away.

The judgment of the County Court should be reversed and of the justice of the peace affirmed, with costs.

All concurred.

Judgment of County Court reversed and that of the justice affirmed, with costs.

ANDREW J. PHILLIPS, Respondent, v. EDWARD F. RITTER, Appellant.

Deed — inconsistent statement in a description — a practical location for eighteen years will govern.

Where a dispute arises between the owners of adjoining premises, claiming under deeds from a common grantor, as to the location of the division line, the description of which, in the older deed, presents inconsistencies which cannot be reconciled, the acts and declarations of the parties are competent upon the question as to the proper construction to be given to the conveyance, and the court may properly adopt a division line which has, for a period of eighteen years subsequent to the first conveyance, been marked by a retaining wall maintained by the owners between their lots.

APPEAL by the defendant, Edward F. Ritter, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Dutchess on the 19th day of December, 1896, upon the decision of the court rendered after a trial at the Dutchess County Special Term.

C. Morschauser, for the appellant.

Milton A. Fowler, for the respondent.

CULLEN, J.:

This is an action in equity to restrain the defendant from trespassing on the plaintiff's land, and for damages. The plaintiff and defendant own adjoining lots on the south side of Union street in the city of Poughkeepsie. The controversy arises from a dispute as to the true location of the division line between the parties. Both claim through a common source of title. The deed through which the defendant claims is the older, and the disposition of the controversy depends on the construction of that conveyance. The deed conveys a certain lot on the south side of Union street, beginning on that street and running various courses and distances, which are immaterial, to the southwest corner of lot No. 29 on a certain map; "thence westerly to a point four feet six inches; thence running northerly parallel with first line to Union street to a point twenty-five feet from place of beginning; thence running westerly along Union street and to the place of beginning twenty-five feet." The whole difficulty arises from the fact that a line from a point four feet six inches west of the corner of lot 29 to a point on Union street twenty-five feet from the place of beginning is not parallel with the first line of the description. A line parallel with the first line, run from Union street southerly, would intersect the extended line of lot 29 at a point about six feet west of the southwest corner of that lot, instead of at a point four feet six inches west of the corner. The deed through which the plaintiff claims, made about a year subsequently to the deed already recited, locates that point of intersection at a distance of six feet from the corner of the lot.

The question, therefore, is, which shall control the location of the easterly line of defendant's lot? Shall it run to a point four feet six inches westerly from lot 29, or shall it run parallel to the first line in the description in his deed? The trial court found the true construction of the deed was that the easterly line should be parallel to the westerly line of the lot. This construction gave the case to the plaintiff. Had the line been drawn between the two given points the case would have gone for the defendant.

The appellant claims that the location of the two points between which the line was to be drawn should govern, and that the provision that the line should be parallel with the westerly line should be rejected. If we were limited solely to the deed itself in arriving at

its proper construction, I am not prepared to deny this claim, but the evidence tends to show that, for eighteen years after the first conveyance from the common source of title, the parties occupied their respective lots up to the line found by the trial court, and that during that period a retaining wall was maintained on that line. This occupation, being less than twenty years, would not be sufficient to establish a practical location of a line concededly incorrect and conclude the parties. But in the case before us there is a conflict between different portions of the description. All of the attributes of the easterly line, as given in the deed, cannot be true. Some part of the description must prevail and some part yield and be rejected. In such a case the acts and declarations of the parties are competent evidence on the question of the proper construction of the conveyance. In *Harris v. Oakley* (130 N. Y. 1) it was held that where the description contained in a deed is so vague, obscure or conflicting as to leave the intent of the parties uncertain, the declarations and acts of the parties may be shown by parol. We think that by this occupation on the one side and acquiescence on the other for eighteen years the parties settled the question of the true construction of the deed for themselves, or at least justified the finding of the trial court on the question of fact.

The judgment appealed from should be affirmed, with costs.

All concurred.

Judgment affirmed, with costs.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. WILLIAM H. GRIM,
Respondent, v. CHARLES W. HAYES and Others, as Trustees of
the Village of Rockville Centre, Appellants.

Village fire department — recommendation of chief engineer and assistants — appointed by village trustees — power of the trustees in case of a tie vote of the delegates of the fire companies.

The provisions of section 3 of chapter 244 of the Laws of 1887, providing that the convention of delegates of the fire companies "shall select separately by ballot suitable persons, electors of such village, for chief engineer and first and second assistant engineers, and the individuals receiving the greatest number of votes for those several offices shall be recommended to the board of trustees of

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said village for their appointment," and of section 4 of said act, providing that "The board of trustees of such village, upon such recommendation, shall appoint a chief engineer and two assistant engineers who shall be electors of said village and who shall hold their offices during the pleasure of said board," seem to contemplate that, before the duty of appointing a chief engineer and assistants is imposed upon the board of trustees, the convention of the delegates of the fire companies must recommend suitable persons for such offices, and that such persons so recommended must be appointed by the trustees.

Where there is a tie vote in such convention of delegates, even though the statute be so construed as to allow the trustees to disregard such recommendation in their appointments, the trustees will not be compelled by mandamus to make such appointments where there are present incumbents of such offices, in view of the fact that the statute provides that they "shall hold their offices during the pleasure of said board."

APPEAL by the defendants, Charles W. Hayes and others, as trustees of the village of Rockville Centre, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 12th day of June, 1897, granting a peremptory writ of mandamus.

John Vincent, for the appellants.

Norman S. Dike, for the respondent.

CULLEN, J.:

The writ was issued in this case directing the trustees of the village of Rockville Centre to forthwith meet and appoint a chief engineer, a first assistant engineer and a second assistant engineer of the fire department of that village. The affidavit of the relator, upon which the writ was granted, stated that, at a meeting of the convention of the delegates of the fire department of the village, certain nominees were recommended and certified to the board of trustees for appointment to those offices. The answering affidavit of the trustees stated that, at the convention of the delegates of the fire department, certain individuals were put in nomination for the offices specified, but that the election resulted in a tie vote, as appeared by the report and certificate of the secretary of the said convention to the board of trustees of the village. For this reason the trustees declined to act. It was further stated that certain persons, previously appointed to the offices, were still holding them and performing all their duties.

We think the writ was improperly granted. By section 3 of chapter 244 of the Laws of 1887, it is provided that the convention of delegates of the fire companies "shall select separately by ballot suitable persons, electors of such village, for chief engineer and first and second assistant engineers, and the individuals receiving the greatest number of votes for those several offices shall be recommended to the board of trustees of said village for their appointment." By section 4 it is provided: "The board of trustees of such village upon such recommendation shall appoint a chief engineer and two assistant engineers, who shall be electors of said village, and who shall hold their offices during the pleasure of said board."

It will be thus seen that, before the duty of appointing a chief engineer and assistants is imposed upon the board of trustees, it is necessary for the convention of the fire companies to recommend to the board suitable persons for such offices. It will also be seen that the convention can only recommend the individuals who receive the greatest number of votes for those several offices. As there was a tie vote, there could be no valid recommendation, and hence the respondents were not in default, especially as the incumbents of those offices were holding over and discharging the duties of the offices.

If, as we construe section 4, it was obligatory upon the trustees to appoint to office persons recommended by the convention, then, of course, there having been no recommendation, there could be no appointment. If, however, the trustees could disregard such recommendation in their appointments, still, as it is provided that the engineers appointed shall hold their offices during the pleasure of the board, we see no reason why the board might not continue the old incumbents in their offices.

The order appealed from should be reversed, with ten dollars costs and disbursements. Motion denied.

All concurred.

Order reversed, with ten dollars costs and disbursements, and application denied, with ten dollars costs.

SAMUEL T. SHAW, Appellant, v. LEWIS N. TONNS, Respondent.

An order to pay a third person from a fund — it must have a valuable consideration to make it an equitable assignment — lien for work done.

An order made by a ship carpenter having a lien for repairs upon a house boat, directed to the owner, stating "will you please pay to Kraemer Bros. the amount of the balance on contract, and also on extra work, and charge to my account," does not, in the absence of proof of any consideration therefor, constitute an equitable assignment of the claim, and is not a bar to the assertion of a lien on the boat by the ship carpenter for the work done thereon.

APPEAL by the plaintiff, Samuel T. Shaw, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Queens on the 1st day of February, 1897, upon the verdict of a jury, and also from an order entered in said clerk's office on the 29th day of January, 1897, denying the plaintiff's motion for a new trial made upon the minutes.

Henry W. Baird, for the appellant.

Nelson Zabriskie, for the respondent.

CULLEN, J. :

This is an action in replevin to recover possession of a house boat, brought by the owner against a ship carpenter to whom it had been delivered for the purpose of repairing. But one question is raised on this appeal. The defendant claimed a lien on the boat for the amount due him for work and materials. On the trial the plaintiff showed that the defendant had given Kraemer Brothers the following order :

" COLLEGE POINT, *June 25th*, 1896.

" SAMUEL T. SHAW, Esq. :

" DEAR SIR.— Will you please pay to Kraemer Bros. the amount \$270⁰⁰/₁₀₀ of balance on contract and also on extra work and 279⁰⁰/₁₀₀ charge to my account.

\$549⁰⁰/₁₀₀

CAPT. L. N. TONNS."

At the close of the evidence the plaintiff asked the court to direct a verdict in his favor, on the ground that the order was an equitable assignment, as to the Kraemers, of the defendant's claim,

and that the assignment destroyed any lien that the defendant might otherwise have had. This request the court refused, and the cause was submitted upon the other issues to the jury, who found for the defendant.

The perfect answer to the appellant's claim is, that no equitable assignment is established. The order on its face recites no consideration, and the plaintiff neglected to prove that there was, in fact, any consideration for it. "The presence of a valuable consideration, upon which the order or direction to pay was founded, becomes the essential and necessary element of an equitable assignment." (*Tallman v. Hoey*, 89 N. Y. 537; *Brill v. Tuttle*, 81 id. 457.)

The judgment and order appealed from should be affirmed, with costs.

All concurred.

Judgment and order affirmed, with costs.

MINNIE NOBLE, as Administratrix, etc., of THOMAS NOBLE, Deceased,
Respondent, v. THE NEW YORK CENTRAL AND HUDSON RIVER
RAILROAD COMPANY, Appellant.

Negligence — a person killed at a railroad crossing where there were no eye-witnesses — inferences as to negligence and contributory negligence — charge as to the speed of the train.

Evidence that shortly after a train, moving south through a city, at a speed of thirty-seven miles an hour, upon a dark and foggy night, had passed a street crossing, a man was found dead, about fifty-six feet south of the crossing, with his skull fractured and his side crushed in, that near him lay a small lantern which belonged to the pilot beam of the locomotive of that train, the door of which lantern was within the lapel of his overcoat, and that when the locomotive arrived in New York city the lantern was missing, and there was blood on the crossbeam of the locomotive, that a northward-bound train had passed the crossing just before the south-bound train, and that on a side track north of the crossing stood freight cars in such a position with reference to the approaching train as to interfere with the view until a person was very close to the track, is proof sufficient, although no one witnessed the accident and there was evidence that the engine bell was rung, to require the submission to the jury of the questions of negligence and contributory negligence.

In such a case, a charge by the court to the jury, that negligence might be predicated upon the speed of the train under the conditions existing at the time and place of the accident, is proper.

APPEAL by the defendant, The New York Central and Hudson River Railroad Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Westchester on the 9th day of December, 1896, upon the verdict of a jury, and also from an order entered in said clerk's office on the 18th day of December, 1896, denying defendant's motion for a new trial made upon the minutes.

Daniel W. Tears, for the appellant.

Arthur J. Burns, for the respondent.

WILLARD BARTLETT, J. :

On the evening of November 2, 1895, at about five minutes after six o'clock, in that part of the city of Yonkers where Ashburton avenue crosses the defendant's railway, the plaintiff's husband, Thomas Noble, was struck and killed by the locomotive of the defendant's train known as the Chicago Limited, on its way from Albany to New York. No one saw the accident, but shortly after the train had passed southward, Noble was found dead near the track, fifty-six or fifty-seven feet south of the crossing, with his skull fractured and his side completely crushed in. Near him lay a small lantern called a marker, which was subsequently found to belong to the pilot beam of the locomotive of the Chicago Limited, and the door of this lantern was under Noble's left breast, within the lapel of his overcoat. Neither the engineer nor the fireman of the train was aware that any accident had occurred until they discovered that the marker was missing and that there was blood upon the crossbeam of the locomotive when they arrived at the Grand Central Station in New York.

The administratrix has recovered a verdict of \$10,000 against the railroad company for the negligent killing of her husband under these circumstances. We are asked to reverse the judgment entered on that verdict and to grant a new trial, on four grounds: (1) Because the evidence did not justify a finding that the deceased was

free from contributory negligence; (2) because it did not establish any negligence on the part of the defendant; (3) because the trial judge instructed the jury that negligence might be predicated of the speed of the train under the conditions existing at the time and place of the accident; and (4) because the damages are excessive.

As to the first point, I think there was sufficient evidence to take the question of contributory negligence to the jury. When last seen alive the deceased was at work in his stable, which was west of the railroad. His way home would take him over the track, and it is altogether probable that he undertook to cross at Ashburton avenue, and was there struck by the train, which was running at the rate of between thirty-seven and forty miles an hour, and would carry him in a single second to the place where his body was found. The gates maintained by the defendant at the crossing were down, but no negligence can be imputed to Noble from the fact that he attempted to cross while they were in this position, as it appeared that it was the custom to keep them down on foggy and stormy nights, except when they were raised to allow teams to pass. The night of the accident was dark and very foggy. "As we passed through Ashburton avenue," says the engineer of the Chicago Limited, "you could not see the track at all ahead of you hardly on account of the fog and darkness." On a switch or side track north of the crossing stood a freight car or freight cars in such a position with reference to the approaching train as to interfere with the view until a person was very close to the track. A northward-bound freight train had just passed the crossing on one of the tracks to the east or must have been passing over it as Noble arrived there. His duty was to look and listen. But to look was of no avail if the car or cars on the siding obstructed his vision, as may well have been the case in the fog, without his perceiving that there was any such obstacle there or what the nature of the obstacle was. And while there is evidence that the engine bell on the Chicago Limited was rung as it neared Ashburton avenue, the noise of the north-bound freight train could readily render its sound imperceptible to a listener situated as was the plaintiff's husband when he endeavored to cross the track.

In actions to recover damages for negligence resulting in death, where there are no eye-witnesses of the accident, the freedom of the

deceased from contributory negligence may be established by proof of facts and circumstances from which it may fairly be inferred that the deceased was not at fault. (*Johnson v. Hudson River R. R. Co.*, 20 N. Y. 65; *Hart v. Hudson River Bridge Co.*, 80 id. 622; *Jones v. N. Y. C. & Hudson R. R. Co.*, 28 Hun, 364; *affd.*, 92 N. Y. 628; *Tolman v. Syracuse, Bing. & N. Y. R. R. Co.*, 98 id. 198.) In the case last cited it is said that if the surrounding facts and circumstances reasonably indicate or tend to establish that the accident might have occurred without negligence on the part of the deceased, a question of fact may arise to be solved by a jury, requiring a choice between possible but diverging inferences. The case at bar seems clearly to fall within the class thus mentioned; and it is easy to find instances in the reports where recoveries have been sustained upon less cogent proof than is here presented, as tending to establish the absence of contributory negligence.

We are also of the opinion that the case was properly submitted to the jury upon the question of the defendant's negligence. The learned trial judge did not say that negligence was to be inferred from the high speed of the train alone, but held that it might be predicated upon the speed in view of the existing conditions. This instruction is well supported by authority. (*Salter v. Utica & Black River R. R. Co.*, 88 N. Y. 42, 50; *Thompson v. N. Y. C. & H. R. R. R. Co.*, 110 id. 636.) It was most appropriate in the present case when regard is had to the circumstances as they existed at Yonkers when this train came along and killed the plaintiff's husband; for the jury were authorized by the evidence to find that the railroad company, by allowing standing cars near the crossing, to obstruct the view of approaching trains, had itself created a condition of things which demanded a decreased rate of speed at this point.

The verdict was liberal, but not so large as to justify us in interfering with it as excessive.

The judgment should be affirmed, with costs.

All concurred.

Judgment and order unanimously affirmed, with costs.

JOSEPH L. PROSEUS, as Executor, etc., of ESTHER PROSEUS,
Deceased, Appellant, v. CHARLOTTE PORTER, Respondent.

Gift inter vivos—a savings bank book in account with the depositor and a third person—right of the third person to whom the book is delivered—when the transfer is not conditional—a savings bank account “in trust”—subsequent drafts by the depositor.

Evidence that Esther A. Proseus, just before going abroad, opened an account in a savings bank in the name of “Charlotte Porter or Esther A. Proseus,” and permitted Charlotte Porter, who was her sister, to draw money from the account and to retain possession of the bank book until the death of Esther, is sufficient to make out a valid gift *inter vivos*; nor is this changed to a revocable gift, *causa mortis*, by proof that, after the donor had returned from abroad and shortly before her death, Charlotte Porter wrote a letter in which she said, “Just before she went to Europe the last time, Mrs. Proseus made me go to the bank with her, and then she put money in for me; in case anything happened to her the money to be mine, and no one could take it from me,” as this language may be regarded as indicating that Mrs. Proseus feared she might not return, and, therefore, made a present permanent provision for the donee.

The fact that Esther A. Proseus, after having had another savings bank account changed so that it stood “Esther A. Proseus in trust for Charlotte Porter,” and having delivered the pass book to Charlotte Porter, drew money from the account, is not necessarily inconsistent with the existence of a trust in favor of Charlotte Porter.

The conclusions above stated are supported by the further fact that Esther A. Proseus by her will requested Charlotte Porter to convey to the husband of the testatrix land to which Charlotte Porter held the nominal title, and said nothing in reference to the bank accounts.

APPEAL by the plaintiff, Joseph L. Proseus, as executor, etc., of Esther Proseus, deceased, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Westchester on the 13th day of February, 1897, upon the decision of the court, rendered after a trial at the Westchester Special Term, before the court without a jury, the parties having waived a jury trial.

James M. Hunt, for the appellant.

John H. Ferguson, for the respondent.

WILLARD BARTLETT, J. :

This case has been twice tried, once before Mr. Justice DYKMAN and a jury, when the jury disagreed, and the second time before Mr. Justice KEOGH, at the Westchester Special Term, when no witnesses were called, but the evidence was read by consent from the stenographer's minutes of the previous trial. The stipulation under which this was done makes the few exceptions in the record to rulings upon the admission of evidence unavailable to the appellant, so that the only question for this court is whether the appellant is right in his contention that the judgment should be reversed upon the facts.

In considering this question we are mindful of the circumstance that the case was presented to the trial court just as it comes before us, and that the learned judge did not have the advantage of seeing and hearing the witnesses. Nevertheless, we have reached the conclusion that his judgment is well supported by the proof.

The plaintiff brings the action, as the executor of his wife, to recover certain moneys which were deposited by her in a savings bank, but which have been obtained since the death of Mrs. Proseus by her sister, Charlotte Porter, the defendant. The trial court decided that, at the time when Mrs. Proseus died, these moneys did not belong to her, but were the property of her sister. There were two accounts in the savings bank. One of these was opened in 1885 in the name of "Charlotte Porter or Esther A. Proseus," and is deemed to have been the subject of a gift to Mrs. Porter by Mrs. Proseus, in 1888, when the latter was about departing from this country on a trip to Europe. Mrs. Porter thereafter drew money from the account and appears to have retained continuous possession of the bank book. The other account was opened by Mrs. Proseus in her individual name, in 1874, but in 1888 was changed to "Esther A. Proseus, in trust for Charlotte Porter," upon the written request of Mrs. Proseus, signed shortly before she sailed for Europe. In the view of the learned trial judge this act constituted a declaration of trust, which was effective to create a valid trust in favor of Mrs. Porter, in whose possession, also, the bank book containing this second account was found after the death of Mrs. Proseus.

To show that the alleged gift of the first account was conditional, the plaintiff put in evidence a letter from the defendant, written

shortly after the death of Mrs. Proseus, in which Mrs. Porter said : "Just before she went to Europe the last time, Mrs. Proseus made me go to the bank with her, and then she put money in for me ; in case anything happened to her the money to be mine, and no one could take it from me." By reason of the safe return of Mrs. Proseus from Europe it is argued that the conditional gift became no gift at all. I think, however, that the passage quoted, and the other statements made by Mrs. Proseus, indicate not so much an intention that her sister was only to have the money in the event that the traveler did not return, but rather that her apprehension that she might not come back led her to make permanent provision for Mrs. Porter at that time.

In respect to the second account, it appears that after Mrs. Proseus returned from Europe she drew money therefrom and deposited money therein, and it is insisted that this conduct on her part is inconsistent with an intention to create a trust for Mrs. Porter. Undoubtedly these acts tend to disprove a trust, but they are by no means conclusive. A trust may be established by a depositor who opens a savings bank account, expressed to be in trust for another, but himself retains the bank book without ever notifying the beneficiary, and dies before the latter, leaving the account open and without anything further to explain its character. (*Cunningham v. Davenport*, 147 N. Y. 43, 48.) It is said in the case cited : "If the intent can be strengthened by acts and declarations of the depositor in his lifetime, amounting to publication of his intent, a more satisfactory case is made out, but it is not absolutely essential, in the absence of explanation, where he dies leaving the trust account existing." In the case at bar the proof is sufficient to make out a trust, under the rule thus laid down, as to the money which remained in the account at the time of the death of Mrs. Proseus. Indeed, it goes further than is positively requisite, for here the depositor did not keep the bank book, but intrusted it to the custody of the beneficiary, who also appears to have been given to understand that she had an interest in the fund, although she may not have comprehended just what were her legal rights in the premises until the controversy arose in respect to the deposits which is the subject of the present litigation.

The view that Mrs. Proseus intended to transfer these deposits so

that they would be beneficially available to her sister is strengthened by the language of the will of Mrs. Proseus, and by the testimony of her husband as to what occurred at the time when the will was executed. Mention is made in the will of a lot of land on Highland avenue, Yonkers, belonging to the testatrix, but standing in the name of her sister, Charlotte Porter (the defendant), and the testatrix requests her sister at once to convey her apparent interest in this lot to Joseph L. Proseus (the husband of testatrix), inasmuch as her sister "has but a nominal interest in the said property, for which no consideration was given." With this testamentary request the defendant has complied. If, in addition to this real property, to which her title was only nominal, Mrs. Porter was also holding the bank books without any beneficial interest in the accounts, it is exceedingly improbable that the testatrix would have omitted to mention that fact to her husband, who drew the will; yet nothing appears to have been said about any money in the savings bank, although the business in hand was the testamentary disposition of all the property of the wife. I regard this omission as strongly indicative of a belief on her part that she had already effectually disposed of this money. By her will nearly all her estate, valued at \$25,000, went to her husband, and the provision which it made for her sister (the interest on \$500 for life) would have seemed disproportionately small if Mrs. Porter was not entitled to the deposits evidenced by the bank books in her possession.

It cannot be denied that if Mr. and Mrs. Porter used the language which the plaintiff attributes to them in the interviews which took place after the death of Mrs. Proseus, there would be reason to doubt the good faith of the defendant's claim; but the plaintiff is contradicted by them in regard to the essential particulars of these interviews, and it cannot be said that he has sustained the burden of proof or established his version by a preponderance of evidence.

On the whole, I think the judgment should be affirmed.

All concurred.

Judgment affirmed, with costs.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. MATTHAUS BANTEL, Respondent, v. CHARLES H. MORGAN and Others, Appellants, Impleaded with FREDERICK A. MEHRER and Others, Defendants.

Election Law of 1896 — imperfect cross X mark — cross X mark to the left of a blank space not filled in with a name — when an alternative writ of mandamus need not issue.

A ballot cannot be counted, under the Election Law (Chap. 909, Laws of 1896), where the elector has not placed a cross X mark in the voting space at the left of the name of a candidate, but has placed, in the column which is provided for the use of electors who wish to vote for persons not formally nominated, a cross X mark in the voting space at the left of the blank headed "For Trustee," no name being written under the latter words.

A ballot should be counted where the cross X mark placed in the circle at the head of a party ticket is not perfect and is something more than a cross X mark, as such a ballot comes within the provisions of section 114 of the act.

There is no occasion to issue an alternative writ of mandamus, where, after the proof is all in, it appears that there is no material dispute of fact, and that the right of the applicant, if he has any, depends merely upon the decision of questions of law.

APPEAL by the defendants, Charles H. Morgan and others, from an order of the Supreme Court, made at the Westchester Special Term and entered in the office of the clerk of the county of Westchester on the 5th day of May, 1897, directing the issuance of a peremptory writ of mandamus commanding the defendant inspectors to count for the relator certain votes for the office of trustee of the village of New Rochelle on two ballots which were voted at the village election held therein on the 20th day of April, 1897.

Roger M. Sherman, for the appellants.

Michael J. Tierney, for the respondent.

WILLARD BARTLETT, J. :

This is a proceeding under section 114 of the Election Law (as amended by chap. 909, Laws of 1896), to determine "whether any ballot and the votes thereon, which has been rejected by the inspectors as void, shall be counted." The ballots in question were two in number, which appear to have been duly delivered to the inspectors,

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by persons entitled to vote at the village election held in New Rochelle, on April 20, 1897. One of these ballots was not counted at all, but was treated as void, because the mark within the circle, at the head of the Democratic ticket, was something more than merely a cross. The votes upon the other ballot, for three of the four offices to be filled, were counted, but it was treated as blank so far as the office of trustee was concerned. In respect to the three other offices, it was properly marked by a cross at the left of the names of the respective candidates for those offices which appeared in the Republican column. The Republican candidate for trustee was Charles H. Morgan, who intervenes in this proceeding. The Democratic candidate was Matthaüs Bantel, the relator. No cross appeared in the proper place at the left of either of their names. But in the column upon the blanket ballot, which is provided for the use of such electors as desire to vote for persons not formally nominated, and whose names are not printed thereon, a cross had been placed by the voter in the space at the left of the blank headed "For Trustee." No name, however, had been written under these words, and, therefore, the inspectors evidently deemed the mark a nullity. It had no meaning with reference to the column of blank spaces in which it appeared, and, if it was intended to be a vote for the relator, whose name was in the next column, the mark should have been in that column, and at the left of the relator's name. The statute provides that the voter "shall make a cross X mark in the voting space *before* the name of each candidate for whom he desires to vote, on whatever ticket he may be." (Election Law, § 105, as amended by Laws of 1896, chap. 909.) This mark was placed after the name of Mr. Bantel, and in a different and wholly distinct column.

Upon the return of the order to show cause why the relator should not have a peremptory writ of mandamus to compel the counting of these two ballots, Charles H. Morgan, the opposing candidate for the office of village trustee, was very properly allowed to intervene, and the court compelled the production of the ballot boxes and took the oral evidence of one of the inspectors as to what had been their action in respect to the two ballots in controversy. After the proof was all in, it appeared that there was no

material dispute of fact, and the case, as it finally came before the learned judge at Special Term for decision, was one where the applicant's right to the mandamus, if it existed at all, depended only upon questions of law, and hence it was not necessary that an alternative writ should first issue. (Code Civ. Proc. § 2070.)

The case of the ballot which the inspectors refused to count because the cross mark in the circle, at the head of the Democratic ticket, was not as perfect as it might have been, came directly within the provisions of section 114 of the Election Law, as amended in 1896. It was a ballot which, to all intents and purposes, had been rejected as void. I think that upon its face it was a good ballot, and that it was the duty of the inspectors, as matter of law, to count it. The determination of the court below as to this ballot was clearly right, and the order, to that extent, should be affirmed.

I am unable, however, to take the view of the other ballot which was adopted at the Special Term. That ballot, as the inspector expressly testified, was counted for the offices of president of the village, treasurer of the village, and trustee at large. It was merely treated as a blank so far as it related to the fourth office of trustee, for which Mr. Bantel and Mr. Morgan were rival candidates. Assuming that this fact authorized the court to institute the investigation provided for by section 114, in order to determine whether there appeared upon the ballot any vote for trustee which should be counted, I think the mere inspection of the ballot itself answers that question in the negative. The voter marked the ballot so as to manifest his choice effectively for president and treasurer and trustee at large of the village; but, whatever may have been his intent in respect to the trusteeship for which Mr. Bantel and Mr. Morgan were rival candidates, that intent is not disclosed in the slightest degree by the mark which he placed in the voting space in the column of blanks. There is just as much reason to infer that he meant to vote for some one whose name he inadvertently omitted to write in the place provided for that purpose, as there is to infer that he meant to vote for Mr. Bantel, simply because the name of that candidate was in the next column, not far off. To make that mark effectual as a vote would, in my opinion, be to make the result of an election turn upon judicial guess work pure and simple.

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The order should be affirmed so far as it applies to the ballot marked Relator's Exhibit B, and reversed so far as it applies to the ballot marked Relator's Exhibit A, without costs of this appeal to either party.

All concurred.

Order affirmed, so far as it applies to the ballot marked Relator's Exhibit B, and reversed so far as it applies to the ballot marked Relator's Exhibit A, without costs of this appeal to either party.

JOHN DUFFY, Respondent, v. ISABELLA M. BURTON, Appellant.

An attaching creditor, substituted to the interests of others, is liable to the sheriff for his fees.

Where an attaching creditor of a company, by agreement with its other attaching creditors, is substituted to their interests, and his attorney, who is made the attorney of record in the actions brought by them, after settling all the attachments, directs the sheriff to release his levies and discontinues the several actions of the other creditors, the attaching creditor thus substituted becomes liable to the sheriff, by operation of law, for his fees in the actions so discontinued.

APPEAL by the defendant, Isabella M. Burton, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Westchester on the 12th day of January, 1897, upon the decision of the court rendered after a trial at the Westchester Special Term.

The action was brought by the plaintiff, the sheriff of Westchester county, to recover his fees for levying the attachments referred to in the opinion. The parties waived their right to a jury trial.

Robert McC. Robinson, for the appellant.

William Romer, for the respondent.

HATCH, J.:

The material facts of this case are without dispute. The defendant was an attaching creditor of the D. G. Burton Company. At about the same time some twenty-one other attachments by different parties were issued and levies made by the sheriff thereunder. After

the levy of all the attachments the defendant, by arrangement with the attaching creditors, became substituted to all their interests therein, and her attorney became the attorney of record therein and represented the defendant in connection therewith. Subsequently, by negotiation, the attachments were settled and the attorney for the defendant directed the sheriff to release the levies thereunder and discontinued the actions. The effect of this arrangement was to render the defendant or her attorney liable to the sheriff for his fees in connection with the actions, and they could not, therefore, be continued by the sheriff for the enforcement of his fees, in the absence of collusion between the parties, and the irresponsibility of the defendant or her attorney. (*Jackson v. Anderson*, 4 Wend. 474; *Crocker on Sheriffs*, § 1162.)

It is without dispute that the defendant was the party in interest in connection with all the actions in which the fees arise, for which the sheriff seeks to recover in this action; and, consequently, upon their discontinuance by her direction her liability to pay the fees became fixed. Such liability does not rest upon an agreement to pay; it is created by operation of law. The amount of the fees having been settled by a formal order upon an appeal to the Appellate Division, taken for that purpose, such sum is conclusive upon the defendant. The testimony of Robert McC. Robinson was improperly received, as it did not appear that he possessed any authority to bind the defendant and was not authorized to speak for her. But this error was harmless, for upon the undisputed facts the plaintiff was entitled to recover.

The judgment should be affirmed, with costs.

All concurred.

Judgment affirmed, with costs.

HENRY MAY and MICHAEL LEVY, Appellants, v. JOHN BERMEL, as Supervisor of the Town of Newtown and one of the Supervisors of the County of Queens, and Others, Respondents.

Queens county — validity of town bonds issued for highway purposes — a majority of the votes cast upon that question, although not a majority of the highest number of votes cast upon any question, is sufficient.

The amendment to the County Law (Laws of 1892, chap. 686, § 69) made by chapter 178 of the Laws of 1896, requiring, among other things, that in the county of Queens "a vote of a majority of the electors" of any town "voting at an annual town meeting," must first be obtained before the board of supervisors of the county can authorize the town to borrow money for highway purposes, was not intended to change the general rule that a measure shall be deemed to have been carried where it receives a majority of the votes which are cast upon that question.

It does not affect the validity of town bonds, issued under a resolution passed at an annual town election and receiving a majority of the votes cast upon that proposition, that, owing to the failure of some of the electors, voting on other questions, to vote on such resolution, it did not receive a majority of the highest number of votes cast at the election upon any question.

APPEAL by the plaintiffs, Henry May and another, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of Queens on the 16th day of June, 1897, upon the decision of the court rendered after a trial at the Queens County Special Term dismissing their complaint upon the merits.

Ira Leo Bamberger, for the appellants.

Townsend Scudder, for the respondents.

HATCH, J. :

The purpose of this action is to restrain the delivery by the defendants of \$620,000 in bonds of the town of Newtown, authorized to be issued in pursuance of a vote of the trustees of the town and of a resolution of the board of supervisors of the county of Queens. It is disclosed by the record that at a regular annual town meeting of the town of Newtown, for the election of town officers and for the transaction of other business of the town, held on the

6th day of April, 1897, there was submitted to the electors voting thereat a proposition to bond the town and borrow money thereon, for the purpose of improving the highways in said town. No claim is made but that all of the statutory requirements leading up to the taking of the vote and the passage of the resolution authorizing the issue of the bonds by the board of supervisors were observed. The defect in the proceedings, if any, lies in the fact that the vote authorizing the issue of the bonds was not a majority of all the votes cast at said town meeting. It appears that the whole number of ballots cast at such election for a town office was 3,753. The whole number of ballots cast upon any submitted question was 3,500. The whole number of votes cast and counted upon the bond proposition, the subject of this controversy, was 2,597, of which "Yes" received 1,650 and "No" received 947. The number of ballots cast and counted where there was no vote upon the bond proposition was 903. The result, therefore, is that, of the whole number of votes cast and counted, the bond proposition failed of obtaining a majority of the electors who voted for the town officers receiving the highest number of votes. It did, however, obtain a majority of all electors who voted upon the bond proposition.

We come, therefore, to a consideration of the vital question in the case: Was it required, in order to authorize the resolution passed by the board of supervisors, that a majority of all of the votes cast and counted for the highest town office should have been cast for the bonding proposition, or was it sufficient that a majority only should be had of those votes cast and counted, upon the proposition to bond? The answer to be given depends upon the construction of the statute under which the vote was taken. The statute upon the subject, prior to its amendment in 1896, is found in section 69 of the County Law (Laws of 1892, chap. 686), and reads as follows:

"The board may, upon the application of any town or towns liable to taxation for constructing, building or repairing any highway or bridge therein, or upon its borders, pursuant to a vote of a majority of the electors thereof at any annual town meeting, or special town meeting called for that purpose, or upon the written request of the commissioners of highways and town board of such town or towns, authorize such town or towns to construct, build and repair such highway or bridge, and to borrow such sums of money for and on

the credit of the town as may be necessary for that purpose, and to lay out, widen, grade or macadamize such highway, or to purchase for public use any plankroad, turnpike, toll-road or toll-bridge in such town or towns, and may authorize the company owning the same to sell the same or any part thereof or the franchises thereof, or to pay any debt incurred in good faith by or in behalf of such town or towns for such purpose. If such highway or bridge shall be situated in two or more towns in the same county, the board shall apportion the expenses among such towns in such proportion as shall be just."

This section provided for two contingencies in which a town might be authorized to borrow money and issue its obligations therefor. *First*, upon application made to the board pursuant to a vote of the electors of the town. *Second*, upon the written request of the commissioners of highways and the town board of the town. This remained the law until 1896, when this section was amended (Laws of 1896, chap. 178). While the phraseology is changed in some slight particulars by the amendment, it remains, so far as important to any question presented by this case, precisely as it formerly stood, except as there is added to such section this clause: "But in the county of Queens a vote of a majority of the electors of any such town or towns, voting at an annual town meeting, or special town meeting called for that purpose, must first be obtained before the board can authorize such town or towns to borrow any money for, or on the faith and credit of such town or towns for the purposes above mentioned."

The only substantial change worked by this amendment is the requirement that in the county of Queens no resolution shall be passed by the board of supervisors pledging the credit of the town, except there be a vote of the electors of the town authorizing the same. The only change which could in any view otherwise affect the construction of the amendment arises out of the addition of the word "voting" at an annual town meeting, in substitution of the language "pursuant to a vote of a majority of the electors," etc. The result would be the same upon a vote in either case. If a majority of the whole number voting is required by the words in one case, it is in the other. If at an annual town meeting a majority of all who voted for any given office did not vote upon the special proposition,

but a majority was obtained of those who voted thereon, in a sense it could be said that such votes did not constitute a majority of the electors at that town meeting, and, therefore, that there was no vote by a majority of the electors. The answer is that the statute contemplated a majority who vote upon the proposition submitted. We do not think that by the addition of the word "voting," any change was contemplated in the number of the electors who should vote, or that any other method of determining such majority was intended to obtain. How this vote should be taken, and when, remains precisely the same in the amended section, is preserved in substantially the same language applicable to counties generally, and no reason is suggested why these words should receive any other or different construction when applied to the county of Queens than when applied to the other counties of the State. If there had been any intention to work a change in this respect, undoubtedly the Legislature would have used language indicative of such intent. The change that was worked is clear, definite and precise, leaving no room for cavil or question, and this consisted in the omission of authority to act upon the request of the commissioners and the town board. The change in phraseology does not indicate an intent to change the law in the absence of substantive language or circumstances indicating that a different rule was intended to be established. (*Davis v. Davis*, 75 N. Y. 221.) We are, therefore, to consider the construction of this language in connection with section 69 as a whole, together with adjudications which have been had upon similar statutes, as there are none construing this particular section. The language is: "A majority of the electors of any such town or towns, voting at an annual town meeting, or special town meeting called for that purpose." If there had been a special town meeting called for this purpose, it could not be contended but that a majority of those who voted would control, even though a majority of the electors of the town did not attend or vote, or if a majority of the electors who attended such meeting did not vote upon the question, or that more blank ballots were cast than affirmative votes. If this would be true as to the special election, it is somewhat difficult to find a substantial reason why it would not be equally true of an annual town meeting. It is a fundamental proposition in our theory of government that the majority shall control, and

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the usual way in which such majority is evidenced is by giving all an opportunity to vote, and then counting such as vote affirmatively and such as vote negatively, the difference between the two constituting the majority. Those who fail to vote and those who cast blank ballots are not considered in determining the result, in the absence of some statutory authority which provides a different method, or commands the determination of a majority, based upon the whole number entitled to vote. Such was the rule at common law. As was said by Lord MANSFIELD: "Whenever electors are present and don't vote at all, * * * they virtually acquiesce in the election made by those who do" (*Oldknow v. Wainright*, 2 Burr. 1017-1021); and the rule is the same in relation to elections held under general or special laws, in the absence of statutory regulations to the contrary. *County of Cass v. Johnston* (95 U. S. 360), where it was said by the chief justice: "All qualified voters who absent themselves from an election duly called are presumed to assent to the expressed will of the majority of those voting, unless the law providing for the election otherwise declares. Any other rule would be productive of the greatest inconvenience, and ought not to be adopted unless the legislative will to that effect is clearly expressed." In this case the court held that a statute which provided "that not less than two-thirds of the qualified voters of such township voting at such election are in favor of such subscription," was not repugnant to a constitutional provision of the State providing that the General Assembly should not authorize a town to become a stockholder or loan its credit, "unless two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent thereto."

In *Carroll County v. Smith* (111 U. S. 556) the court considered the effect of a similar constitutional provision, using this language: "The assent of two-thirds of the qualified voters of the county, at an election lawfully held for that purpose, to a proposed issue of municipal bonds, intended by that instrument, meant the vote of two-thirds of the qualified voters present and voting at such election in its favor, as determined by the official return of the result. The words 'qualified voters,' as used in the Constitution, must be taken to mean not those qualified and entitled to vote, but those qualified

and actually voting. In that connection a voter is one who votes, not one who, although qualified to vote, does not vote."

To the same effect is *St. Joseph Township v. Rogers* (16 Wall. 644). Such, also, is the rule applicable to private corporations. (*Field v. Field*, 9 Wend. 394; 1 Morawetz on Priv. Corp. § 476.)

It was said by Chancellor KENT that the same principle prevails in incorporated societies as in the community at large, and that acts of the majority in cases within the charter power control, the majority meaning the major part of those present at the meeting who act. (2 Kent's Com. [14th ed.] 293.) We think, also, that the reasons assigned by the court in *Smith v. Proctor* (130 N. Y. 319) logically carry the construction of this statute to the same result. Counsel for the appellant relies upon *People ex rel. Hetfield v. Trustees* (70 N. Y. 28) as establishing a contrary doctrine. It is to be observed that this case arose under an act authorizing towns to bond in aid of the construction of railroads. The courts of this State in construing these statutes have uniformly held that a strict compliance with the statute was essential, as the purpose of such legislation involved an incumbrance of the taxable property of the town in aid of a private enterprise. Such expenditure of public money, or pledge of public credit, was quite foreign to any purpose of governmental expenditure for the public good and came in time to meet an absolute constitutional prohibition based upon principles of public policy. The case is clearly distinguishable from the present statute. The Railroad Act, authorizing the town to bond, required that the "taxable inhabitants of said village may at such meeting, by a majority vote, decide to raise a sum not exceeding twenty thousand dollars for the purposes provided in this act." And further: "In case a majority of said taxable inhabitants shall vote to raise such sum for said purpose," etc. It is noticed that the right to incur the debt is limited to a specific class of inhabitants *i. e.*, those who were to pay the debt; and it is clear, as the court held, that the object of the statute was to obtain a majority expression of such persons before a debt could be saddled upon them, and that it would be satisfied with nothing less. In the present case the object of the expenditure is for a purely governmental purpose which inures to the general good of the public at large. The right to vote upon the proposed expenditure is not limited to any

class of citizens, but embraces all qualified voters. The distinction between the two cases is plain and radical. One seeks to pledge the public credit for private ends, which course is opposed to public policy; the other seeks to create better conditions for the enjoyment of all citizens. The first leads the courts to a strict and literal construction of the law; the second relaxes the rule and invites a liberal view. One is opposed to the public policy of the State; the other is her handmaid, leading to the public good. Many cases arising in other States are cited by the learned counsel for the appellants, and others might have been cited, where the courts have adopted the view opposed to the one which meets our approval, as above expressed. The authorities, it is conceded, are not in harmony, and, in at least one State, the view of the court is not in all respects in harmony with itself. (*State v. Winkelmeier*, 35 Mo. 103; *State ex rel. Bassett v. Mayor of St. Joseph*, 37 id. 270.)

We do not attempt to reconcile what is irreconcilable. There is no want of harmony in the decisions of this State, so far as they have gone, and we are led to the conclusion that the reasoning of the cases we have cited expresses the correct rule of law. Extreme cases may be supposed where a technical majority might exist, and yet where the court would feel constrained to hold that the statute had not been complied with. If only one or two votes should be cast upon a proposition, and those for it, in a case where there existed thousands of electors, the court might well hold that there had been no expression by the people upon the subject. Such cases are not likely to arise, and such is not the present one. Here the vote was large and the majority substantial.

This prompts us to say that the statute was satisfied and the resolution of the board was authorized by a majority vote of the electors who voted upon the proposition to bond at the annual town meeting.

The judgment should be affirmed, with costs.

All concurred.

Judgment affirmed, with costs.

Cases
DETERMINED IN THE
FOURTH DEPARTMENT
IN THE
APPELLATE DIVISION,
July, 1897.

MARY A. FELTS, Appellant, v. ANNIE MARTIN, Respondent, Individually, and as Guardian of HARRIET B. MARTIN, an Infant.

Foreclosure — surplus moneys, distributed to the widow and heir without notice to a general creditor of the mortgagor — action to compel a return of the money.

Surplus moneys, arising from the foreclosure of a mortgage given by a decedent, are, by the provisions of section 2798 of the Code of Civil Procedure, real property applicable to the payment of his debts in case of a deficiency in his personal estate, and where his administratrix, who is also his widow, without notice to a general creditor of the decedent, procures an order from the Supreme Court directing such a surplus, in the hands of a county treasurer, to be distributed to herself as widow and as guardian of the infant heir of the decedent, such general creditor, herself the purchaser at the sale in foreclosure, but not a party to that action, may, upon allegations that the personalty of the decedent is insufficient to pay his debts, maintain an action to compel the administratrix to return to the county treasurer the moneys wrongfully diverted by her, to the end that the plaintiff's debt be paid.

Semble, that within three years from the time that the letters of administration were issued, the creditor may, under section 2750 of the Code of Civil Procedure, proceed, by petition in the Surrogate's Court, to enforce her lien upon the surplus moneys, returned to the hands of the county treasurer, in which proceeding the dower of the widow in the surplus may be admeasured.

APPEAL by the plaintiff, Mary A. Felts, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Monroe on the 23d day of March, 1897, upon the decision of the court rendered after a trial at the Monroe Special Term dismissing her complaint, with costs, upon the ground that it did not state facts sufficient to constitute a cause of action.

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George P. Decker, for the appellant.*Charles Van Voorhis*, for the respondent.

HARDIN, P. J. :

On the 10th of March, 1895, Joseph Martin died intestate in the town of Hamlin, and in the same month proceedings were duly had in the Surrogate's Court of that county, which resulted in letters of administration upon his estate being issued to Annie Martin, as administratrix, who qualified and entered upon the discharge of her duties as such. The intestate was seized of a parcel of land situated in said town, which is described in the complaint, and which was subject to a lien of a mortgage given to secure the sum of \$2,500 by the said Joseph Martin to the Rochester Savings Bank, executed on the 10th of May, 1893. After a default in the payment of the mortgage an action was brought to foreclose the same in January, 1896, against the administratrix and Harriet B. Martin, who was the only heir of the intestate, and the proceedings resulted in a decree made on the 3d day of February, 1896, directing a sale of the mortgaged premises, which were, by the referee appointed in the decree, sold on the 14th day of April, 1896, and they were bid off by this plaintiff for \$3,350, and after payment of the mortgage and the costs and expenses of the foreclosure there remained a surplus in the sum of \$544.41, and, according to the directions of the decree, the referee, on the 27th of April, 1896, paid the same to the treasurer of the county of Monroe.

Joseph Martin was indebted at the time of his death "in an amount largely in excess of the amount of his estate, and that his debts, unsecured by mortgage, exceed the sum of \$5,000, and that the total assets, as shown by the account heretofore made and filed with the Surrogate of Monroe county" by the defendant, as administratrix, amounted to the sum of \$1,582.71; and it was averred in the complaint that the amount of the assets of said estate which will be applicable for distribution among the creditors of said estate "will be insufficient to pay in full the debts owing by said decedent."

It is alleged that the plaintiff is a creditor of said estate and holds demands against the same in an amount of about \$4,000, on which demands no payments whatever have been made by the administratrix; and it is averred that the plaintiff has no security

for payment "outside of the assets and property of the said decedent."

It is further alleged in the complaint, viz.: "That immediately after the deposit of said surplus with the said county treasurer this defendant, well knowing of the insolvency of the said estate, and, without the knowledge of this plaintiff, contrived to get said surplus moneys into her own hands, and caused notices of claim thereto to be filed in the clerk's office of Monroe county in behalf of herself and said infant, and by proceedings duly had in the Surrogate's Court of Monroe county, letters of temporary guardianship of the person and property of said Harriet B. Martin, an infant of about the age of two years, were issued to this defendant out of said Surrogate's Court on May 19th, 1896, limited until the said infant arrived at the age of fourteen years, and the said defendant qualified and has since acted as such guardian. That on May 5th, 1896, this defendant, on application to this court, procured an order of reference to H. C. Mitchell to report to the court the liens against said surplus fund, without any notice to other interested parties, after which a report was made to this court on the 9th day of May, 1896, reporting that this defendant, as the widow of decedent, was entitled to the sum of \$117.96 thereof, and the said infant to the sum of \$426.48 thereof, and thereafter, and on May 19th, 1896, this defendant, on application of * this court, procured an order confirming the said report and directing the said county treasurer to pay out of said fund, for herself and in her own right, the sum of \$117.96, and to herself, as general guardian of said infant, the sum of \$426.48; and thereupon she applied to the said county treasurer and obtained from him payment of the said sums, which she has since held."

The plaintiff further alleges that, as a creditor of said insolvent estate, she "claims, and has a lien upon the said surplus moneys for the payment of such part of her claims against said estate as shall remain after the application thereon, through the Surrogate's Court, of the said assets in the hands of said administratrix, and that the right and security of this plaintiff for the enforcement of her said rights against said fund is greatly impaired and imperiled by reason of said withdrawal thereof from the hands of said county treasurer

* *Sic.*

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by this defendant, which said withdrawal was accomplished without any notice to this plaintiff and without her consent and against her will."

It is further alleged in the complaint "that the withdrawal of said funds from the said county treasurer by this defendant was unlawful, and that the said proceedings in this court, instituted and taken by this defendant for the purpose of getting said moneys into her own hands, were without jurisdiction on the part of this court and were and are void."

It is further alleged that, prior to the commencement of this action, the plaintiff demanded of the defendant "that she return to, and deposit with the said county treasurer, the said surplus moneys so obtained by her, but which the defendant has refused and neglected to do."

The plaintiff, in her complaint, asks for a decree directing the defendant to return to the county treasurer of Monroe county the said surplus moneys so withdrawn, there to remain until disposed of according to law.

The answers of the defendants admitted nearly all of the material allegations of the complaint, and alleged that claims were filed by the defendants and proceedings instituted for the disposition of the surplus moneys, and that an order of reference was made "to report to the court the liens against the said fund, and that subsequently a report was duly made by the said H. G. Mitchell, to which report and all the proceedings had in such surplus proceeding these defendants refer." They also allege that an order was granted confirming the report, and the moneys were paid over, \$117.96 to the defendant as widow, and \$426.48 to her as general guardian of Harriet B. Martin.

The answers also contain some denials of some of the allegations of the complaint.

Inasmuch as it was held that the complaint did not state facts sufficient to constitute a cause of action, the allegations of the complaint must be regarded as admitted for the purposes of considering the question of whether the decision was correct.

In considering whether the complaint states facts sufficient to constitute a cause of action, it must be "deemed to allege what can be implied from the allegations therein, by reasonable and fair

intendment, and facts impliedly averred are traversable in the same manner as though directly averred." (*Marie v. Garrison*, 83 N. Y. 14; S. C. approved and followed in *Sanders v. Soutter*, 126 id. 196.)

After the sale of the decedent's real estate, upon the mortgage, the surplus money remaining is to be treated as real estate and is subject to the lien of the creditors of the decedent, and liable to have such debts of the decedent enforced therefrom as remain after exhausting the personal assets of the decedent. From the allegations of the complaint it is apparent that the personal assets are insufficient to pay the debts, and that the plaintiff is a creditor, and, therefore, has a lien upon the surplus money, in common with other creditors, and is entitled to follow the surplus money and enforce the lien through appropriate proceedings to be instituted for that purpose.

In *Platt v. Platt* (105 N. Y. 489) it was held that during three years after the death "the real estate left * * * cannot be so aliened by heirs or devisees as to defeat the claims of creditors thereon. (2 R. S. 100; Code Civ. Proc. § 2749.)"

In *Rosseau v. Bleau* (131 N. Y. 182) that case was cited with approval and the doctrine thereof reasserted in the following language: "The rights of creditors against the real estate of deceased persons attaches to the land as a statutory lien immediately upon the death of the owner, and, of course, their rights cannot be impaired by any conveyance which is delivered or takes effect subsequently."

The debts of the decedent that remained after the application of the personal assets are in "the nature of charges upon the real estate of the intestate debtor, and attached in the same manner to the surplus when it was realized in the action prosecuted for the foreclosure of the mortgage. This resulted from the statutory enactments existing upon this subject, providing for the application of the real estate for the payment of the debts of the intestate, when the personalty has been found to be insufficient for that purpose. It is only the residue remaining after payment of the debts which can be divided between the heirs or devisees of the deceased debtor." (*German Savings Bank v. Sharer*, 25 Hun, 411.) In that case it was said that the provisions of the statute creating the liens

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controlled, and that an opportunity should have been afforded to all the creditors "to present and substantiate their claims. And ordinarily the course prescribed by the statute for executors and administrators is the only one which can be either safely or properly adopted." In that case one of the creditors had not appeared in the action, and no notice was given to him as to the distribution of the surplus money, and in the opinion it was said: "This violated a fundamental right in the enjoyment of which he was entitled to be protected. He had done nothing whatever for which he could be lawfully deprived of this right, and as he had received no information of the proceeding he could not properly be charged with neglect because he had omitted to present his claim at an earlier period of time than he did. The fact that the other creditors have received the money which was probably payable to him cannot change the legal aspect of the case. That a wrong has been done to him through their agency or participation is no reason whatever why it should be rendered still further effectual by denying him all opportunity for redress."

The duty of a party conducting proceedings as to surplus money to give notice to all persons who have liens by record or otherwise, is recognized in *Kingsland v. Chetwood* (39 Hun, 610). It was there said, in referring to rule 64, "And that this was not intended to be restricted to liens appearing by the records is evident from the further requirement contained in the rule that the party 'moving for the reference shall show by affidavit what unsatisfied liens appear by such official searches, and whether any and what other unsatisfied liens were known to him to exist.'"

In this case the facts stated in the complaint clearly evince that the defendant knew of the death; knew of the debts, and, therefore, knew of the existence of the statutory lien in favor of the creditors of the deceased at the time the proceedings were instituted by her to reach the surplus money.

Section 2798 of the Code of Civil Procedure provides, viz.: "Where real property, or an interest in real property, liable to be disposed of as prescribed in this title, is sold, in an action or a special proceeding, specified in the last section, to satisfy a mortgage or other lien thereupon, which accrued during the decedent's life-

time, and letters testamentary or letters of administration upon the decedent's estate were, within four years before the sale, issued from a Surrogate's Court of the State having jurisdiction to grant them, the surplus money must be paid into the Surrogate's Court from which the letters issued pursuant to the provisions of section 2537 of this Code, and the receipt of the county treasurer shall be a sufficient discharge. * * *

The title to which the section refers relates to disposition of decedent's real property for the payment of debts and funeral expenses.

The adult defendant was appointed administratrix within the time mentioned within the section. The surplus money arising upon the sale was, therefore, properly payable into the Surrogate's Court.

Section 2537 of the Code of Civil Procedure provides that, where the statute requires the payment of money into the Surrogate's Court, "the same must be paid to or deposited with the county treasurer of the county to the credit of the fund or of the estate, or of the special proceeding."

The validity of the legislation providing for the deposit of the surplus money arising in foreclosure actions with the Surrogate's Court was approved in *Matter of Stilwell* (139 N. Y. 337), and in the opinion in that case it was said: "The Code deals only with a fund arising from the execution of the foreclosure judgment, not disposed of by the decree, and commits that fund to the custody and control of a court which, at the time the Constitution was adopted, had extensive jurisdiction over the estates of deceased persons, and this jurisdiction was recognized by that instrument in various provisions for its future organization and existence." In that case the validity of sections 2798 and 2799 of the Code of Civil Procedure was asserted.

The object of the legislation seems to have been to guard the surplus money arising under foreclosure actions like the one referred to in the complaint in this action, and to place the fund so arising where the same may be subject to the action of the Surrogate's Court having jurisdiction of the estate of the decedent.

The withdrawal of the money from the Surrogate's Court, or from the custody of the county treasurer, interfered with the right of the plaintiff to enforce the statutory lien given to her as a creditor of the deceased; and as that withdrawal was accomplished

without any notice to the plaintiff, and without any consent on her part and against her will, and insisted upon against a demand made by her to restore it to the treasurer, it seems that she had a right to have the same returned to the Surrogate's Court to the end that her statutory lien might be enforced and satisfied according to the provisions of law in such case made and provided.

The plaintiff's complaint expressly averred that she had and has "a lien upon the said surplus moneys for the payment of such part of her claims against said estate as shall remain after the application thereon, through the Surrogate's Court, of the said assets in the hand of said administratrix."

The plaintiff was not a party to the foreclosure action, nor was she made a party, by notice or otherwise, of the proceedings instituted in respect to the surplus moneys arising after the foreclosure of the mortgage.

Upon the facts and circumstances detailed in the complaint, it is difficult to conclude that the defendant acted in good faith in causing the money to be withdrawn from the Surrogate's Court without notice to the creditors having a statutory lien upon the same.

Again, so far as the proceedings attempt to deal with her dower, there was no notice to the parties beneficially interested in the fund, or having a lien thereon, and it is reasonable to suppose that the order made by the Supreme Court in relation to the withdrawal of the fund was through inadvertence, mistake or by reason of some fraudulent practice with which the defendant is chargeable.

It seems that the tribunal that was thus induced, irregularly and without jurisdiction over the parties having a lien upon the fund or interested therein, to divert the money, was the proper tribunal to order a restoration thereof, and it is no defense to such a proceeding to assert that the Surrogate's Court might have allowed proceedings to be instituted for the return of the money.

It is within the equitable jurisdiction of the court to declare void an order or decree obtained by overreaching the court, or by a fraud practiced thereupon, or to restore a fund taken from the court without notice to the parties having statutory lien or otherwise thereon. (*Wright v. Miller*, 8 N. Y. 9; *Hackley v. Draper*, 60 id. 88; *Whittlesey v. Delaney*, 73 id. 571; *Leet v. Leet*, 12 App. Div. 11.)

From the facts disclosed in the complaint, it does not appear that

the plaintiff has committed any wrong or omitted anything which she should have performed to avoid the situation under which she now complains. It is without her fault that the fund has been withdrawn and her lien imperiled, and it is but just and equitable that the fund should be restored, to the end that her lien may be administered, after due notice, in proceedings instituted for the distribution of it among the creditors of the decedent justly entitled thereto.

If it be assumed that the surplus money is a trust fund for the payment of the debts of the decedent who have a statutory lien thereon, then it may be said the defendant has, by the withdrawal thereof, become *ex maleficio* a trustee, and that the creditors of the decedent having a lien thereon are entitled to compel her to restore the money to the Surrogate's Court, to the end that the same may be administered according to the provisions of law.

As the testator died on the 10th of March, 1895, and letters of administration were issued in that month, the three years mentioned in section 2750 of the Code of Civil Procedure, in which any creditor of a decedent may present a petition for a decree directing the disposition of the decedent's real property, or interest in real property, had not expired, and has not yet expired, and, therefore, the creditor mentioned in the complaint may yet pursue the remedy, by petition mentioned in that section, if the surplus money shall be returned to the Surrogate's Court, or to the hands of the county treasurer as its officer.

It is asserted by the learned counsel for the respondent that the plaintiff was a purchaser at the foreclosure sale and furnished the money which paid the mortgage, and also created the surplus, which was deposited by the officer making the sale with the county treasurer, and it is, therefore, contended that the plaintiff is estopped. It was alleged, however, in the complaint that the "withdrawal was accomplished without any notice to this plaintiff, and without her consent and against her will." Under those circumstances, inasmuch as the plaintiff was not a party to the proceedings relating to the surplus money, we think she was not bound by them. Not having been a party to the action nor to the proceedings, she ought not to be bound by them. The surplus is to be regarded as realty belonging to the intestate.

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In *Fliess v. Buckley* (22 Hun, 554) it was said: "There is no difference in principle between such surplus and a parcel of the realty remaining unsold, after a sale of enough to satisfy the judgment of foreclosure." And in *Dunning v. Ocean National Bank* (61 N. Y. 506) it was said, viz.: "The terms of the statute show that the surplus is regarded as real estate. The most careful precautions are taken to prevent the heirs from being deprived of it, except in the same manner and to the same extent that would be permitted in case the land had remained unsold."

In *Fliess v. Buckley* (90 N. Y. 291) it appeared that William M. Fliess was a party to the foreclosure action, and it was there said: "His remedy, therefore, was to enforce his claim in the court by whose directions the foreclosure had taken place. He requires no other action, nor has he any interest in the relief sought by the other plaintiffs." We see nothing in that case which aids the contention of the respondents.

In *Breevort v. M'Jimsey* (1 Edw. Ch. 554) it was said that, after a sale fairly made in a mortgage foreclosure, the surplus is to be regarded as "a substitute for the sale which the administrator might have procured." And it was further said that the equitable rights of the creditors to the surplus attached at once to such proceeds of the sale as remain after satisfying the mortgage debt, and stand "instead of the land," and the money is to be applied in the same equitable manner as it would be were lands sold by direction of the surrogate.

Doubtless the widow is entitled to dower in the surplus as she was in the land before the sale. (*Matthews v. Duryee*, 45 Barb. 69; *Elmendorf v. Lockwood*, 4 Lans. 396.) It is not necessary, however, on this appeal to determine the extent of her dower in the surplus. Suffice it to say that, before it is actually admeasured, the parties who are interested in the surplus fund are entitled to be heard.

Inasmuch as the plaintiff was not a party to the foreclosure action, nor was she a party to the proceedings instituted by the defendant in respect to the surplus money, she occupies the position of a stranger to the record, and may insist that the order made in the surplus proceedings, which were without notice to her, be held inefficient as to her. (Freem. Judg. [3d ed.] § 337; *Vose v. Morton*, 4 Cush. 27.)

It may be that when the facts mentioned in the complaint are

fully developed at the trial they will indicate more clearly, than expressly alleged, that the conduct of the defendant has been fraudulent, and, therefore, that she should not be, in any sense, protected by the proceedings alleged to have taken place in respect to the surplus money rightly belonging to the custody of the county treasurer.

The foregoing views lead to the conclusion that the decision at the Special Term was erroneous.

Judgment reversed and a new trial ordered, with costs to abide the event.

All concurred, except FOLLETT, J., not voting.

Judgment reversed and a new trial ordered, with costs to abide the event.

COMMERCIAL BANK and MENZO VAN VOORHIS, Appellants, v.
CATHERINE BOLTON, Appellant, and FREDERICK A. SHERWOOD,
Respondent, Impleaded with Others.

Debtor and creditor — a bona fide creditor "secured" to the exclusion of others — a single instrument of transfer "securing" two creditors, one fraudulent, the other not, sustained as to the latter — delay in the furnishing of the consideration of the transfer.

A debtor has a right to transfer his property to one creditor to the exclusion of his other creditors, provided the transfer is made in good faith and upon a reasonably adequate consideration in the amount of the debt thus paid; but the adequacy of the consideration is not material and will not protect the transfer where the intent of the transfer is to hinder, delay and defraud the debtor's creditors.

A transfer by a debtor to his wife will be closely scrutinized, and the fact that she subsequently employed her husband as her agent in the business formerly transacted by him, is competent upon the question of fraud.

A creditor who confessedly held a valid claim against his debtor, knowing that his debtor was in embarrassed circumstances, and that his means of paying the debt rested largely in the plant and property which he owned, with a view to obtaining satisfaction of his debt, acting according to usual business impulses in such cases, treated with his debtor and finally reached a conclusion that he would take one-half the plant and property, offered in liquidation of the indebtedness to him, of his debtor, who assigned the other half to his wife, asserting that she was a just creditor to the extent of its value.

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Held, that such transfer to the creditor was valid as against other creditors of the common debtor, although the latter was not in fact indebted to his wife, and that the transfer was void, as against his creditors, to the extent of the half transferred to her.

Semble, that it was not necessary that the creditor should believe that his debtor was indebted to his wife provided that the creditor's purpose was to obtain satisfaction of his own claim.

The fact that the creditor did not at the time of the transfer, pursuant to the agreement made with his debtor, surrender to him all the evidences of his debt, consisting of notes, some of which had been discounted, and against all of which the creditor had agreed to protect the debtor, is not material, where it appears that the creditor carried out his agreement within a reasonable time.

APPEAL by the plaintiffs, Commercial Bank and Menzo Van Voorhis, from so much of a judgment of the Supreme Court, entered in the office of the clerk of the county of Monroe on the 14th day of August, 1896, upon the decision of the court rendered after a trial at the Monroe Special Term, as dismisses their complaint on the merits as to Frederick A. Sherwood; also an appeal by the defendant Catherine Bolton from the whole of said judgment.

The trial court found as a conclusion of law that the complaint should be dismissed as against the defendant Frederick A. Sherwood, with costs. *Second*, that the bill of sale executed and delivered by Thomas Bolton to the defendants Sherwood and Catherine Bolton, and the agreement executed and delivered by the same parties, both instruments bearing date on the 2d day of August, 1893, "are and each of the said instruments is fraudulent and void so far as the same purport to sell and convey to the defendant Catherine Bolton the undivided one-half of the property therein mentioned and described as against the plaintiffs in this action; and that the said undivided half of said property so transferred to the defendant Catherine Bolton was and is applicable to the payment of the plaintiffs' said judgments."

Hubbell & McGuire and *John Van Voorhis*, for the plaintiffs.

Heman W. Morris, for Catherine Bolton.

William F. Cogswell, for Frederick A. Sherwood.

HARDIN, P. J. :

Prior to August 2, 1893, Thomas Bolton had been carrying on a boot and shoe business and a manufacturing establishment of such

articles, located at 93 Andrews street, in the city of Rochester. About that time he became embarrassed in his business affairs and insolvent, and on that day he executed the bill of sale and agreement mentioned in the complaint and referred to in the findings of fact made by the trial court, whereby he sold the plant and the fixtures and assets in connection with the business to the defendants Catherine Bolton and Frederick A. Sherwood, who immediately took possession under the same and carried on the business until the 15th day of August, 1893, when a sale was made to the defendant Behn, and the defendant Sherwood ceased to have any connection from that time with the business. Subsequently the plaintiffs recovered several judgments against Thomas Bolton upon demands which they held against him prior to the 2d of August, 1893, and caused executions to be issued thereon and the same were returned unsatisfied, and thereupon this action was commenced and complaint filed, in the nature of a creditor's bill, to strike down the bill of sale and the agreement made on the 2d of August, 1893.

Mrs. Bolton and Sherwood served answers in which they allege the *bona fides* of the purchase by them, and that they acquired under the bill of sale and the agreement the properties mentioned therein for a valuable consideration. The issues were brought to trial at a Special Term and findings were made and a recovery had in favor of the plaintiffs against Catherine Bolton, Frederick A. Sherwood and Thomas Bolton. An appeal was taken to the late fifth department, and that appeal was heard and decided, resulting in an affirmance of the judgment as against Thomas Bolton, and a reversal of the judgment, so far as it was rendered, as against Catherine Bolton and Frederick A. Sherwood. An interesting and instructive opinion was delivered by BRADLEY, J., which is found reported in 87 Hun, 547. That opinion refers somewhat in detail to the facts as they were presented by the appeal book then before the court; and the opinion indicates that the reversal was placed upon the ground that certain documentary evidence was improperly received as against Mrs. Bolton and Sherwood, and as that evidence was competent against Thomas Bolton, the judgment as to him was affirmed, although reversed as to the other two defendants. That court held, however, viz.: "A debtor has a right to transfer his property to any of his creditors, and they may accept it in payment of their debts to

the exclusion of other creditors, provided the transfer is made in good faith and has a reasonably adequate consideration. Where a debtor makes a transfer of his property with intent to hinder, delay and defraud his creditors, and the transferee accepts the transfer to consummate such a purpose, the adequacy of the consideration is immaterial and will not protect the transaction."

In the view we take of the case on the present appeal there is no occasion to differ from the rules of law laid down in that opinion.

A second trial was had, resulting in the judgment from which the present appeals are taken. Upon that trial a very large volume of evidence was given, relating to the main issues of fact raised by the pleadings. We have studiously and cautiously looked into the evidence relating to the findings of fact stated in the decision of the trial court, and have, after much deliberation thereon, reached the conclusion that the findings are supported by evidence and should be sustained. We are aware that there is a great conflict in the evidence, and that there was opportunity furnished by it for the court to draw deductions and inferences therefrom in respect to the intents and motives of Thomas Bolton on the occasion of the sale, and that there was a contrariety of evidence in respect to the intent and purpose of Sherwood at the time he purchased an undivided half of the property. Many facts and circumstances are disclosed in the evidence which warrant the conclusion reached by the trial judge. However, upon many of the issues springing out of the transaction inferences and deductions were possible which would have been more favorable to the position ingeniously and strenuously put forward by the plaintiffs.

Before accepting the conclusions of fact stated by the learned trial judge we have carefully considered the opinion delivered by him in connection with the findings of fact announced, and we have not discovered that he has stated any erroneous rule of law therein. We have become satisfied that the evidence warrants the conclusion that the purchase, so far as it relates to Mrs. Bolton, was fraudulent, and ought not to be permitted to stand. In determining the latter question we have brought to mind the circumstance that the judgment, as formerly entered, declared the transaction fraudulent and void, so far as it related to Mrs. Bolton's intent in the premises,

and that the evidence given upon this trial, so far as it related to Thomas Bolton's intent in making the sale, was sufficient to warrant a finding that his purpose was fraudulent as against the plaintiffs, his judgment creditors, at least to the extent of the sale, so far as it was made to his wife, Mrs. Bolton. On the other hand, we are satisfied that the facts and circumstances, and large volume of evidence produced at the trial, warranted the conclusion that the purchase, so far as Sherwood was concerned, was without any fraudulent intent on his part.

It was stated in the opinion of BRADLEY, J. (87 Hun, 552), viz. : "While Sherwood was not pressing Bolton, he evidently had become somewhat anxious about his own matter, and his leading object in becoming the purchaser was to get payment of Bolton's liabilities to him." It was further stated in that opinion : "Whether or not the sale was made with intent to defraud the other creditors, and whether the act of purchase was infected with a like imputation, were questions of fact, within the province of the trial justice to determine, and his conclusion in that respect was permitted and supported by the evidence, and the inferences legitimately derivable from it. This may have been founded somewhat upon the fact as found that the debts which Bolton owed the purchasers were much less in amount than the value of the property."

Upon the second trial clear and competent evidence was given in respect to the intents of Thomas Bolton, Catherine Bolton and Sherwood, and we are of the opinion that the intents and purposes, as stated in the findings of fact now before us, are in harmony with the weight of the evidence. Inasmuch as the evidence warranted the finding that the purchase made by Sherwood was for the purpose of obtaining payment of his debts and claims against Bolton without any intent upon his part to perpetrate a fraud upon the other creditors of Bolton, and that the consideration which he was to pay was adequate, it must be said that his purchase was for a valuable consideration. (*Murphy v. Briggs*, 89 N. Y. 446, which is quoted with approval in 87 Hun, 557.)

In *Stanley v. National Union Bank* (41 Hun, 640; S. C. affd., 115 N. Y. 135) it was said in respect to a debtor's disposition of his property, that he had the right to dispose of it in payment of his debts as he saw fit, "provided he did so in good faith. He could

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lawfully have transferred to Babbitt directly any of the property included in the mortgage in satisfaction of his debt, or make any other arrangement which should render its appropriation upon the debt certain and secure."

It has been insisted by the learned counsel for the plaintiffs that the fact that the husband of Catherine was employed as her agent in conducting the business subsequent to the sale to Sherwood is a circumstance adverse and bears largely upon the question of intent. We think the circumstance was competent and was entitled to be considered by the trial court in connection with the other evidence.

In *Stanley v. National Union Bank* (*supra*) it was said: "That such circumstance is competent evidence to show the intent of the parties upon a question of fraud has been adjudged in many cases; but it has also been frequently decided that it afforded no conclusive evidence of a fraudulent intent. (*Abbey v. Deyo*, 44 N. Y. 344; *Buckley v. Wells*, 33 id. 518.)"

The learned counsel for Menzo Van Voorhis has called our attention to several badges of fraud, among them the following: *First*, that there was a transfer by Bolton of all his property; and, *second*, that Mrs. Bolton withheld a deed from record, and the hasty character of the inventory taken and the circumstance that Mrs. Bolton was one of the purchasers, and the claim that the debt to the wife was fictitious in a large part. We must assume that the trial judge gave proper attention to those features of the case, as we have attempted to do in deliberating upon the conclusion which he reached in respect to the fraudulent intent of Bolton, and the assertion that his wife was cognizant of his fraudulent intent, and we have applied the rule laid down in *Manchester v. Tibbitts* (121 N. Y. 222), which is to the effect that transactions between husband and wife in respect to properties under circumstances somewhat similar to those developed in this case are to be rigidly scrutinized. It may be observed, however, that several of the circumstances mentioned and considerations suggested do not relate to the position occupied by Sherwood at the time of the purchase made by him. Further comment upon the facts and circumstances relating to the purchase of a portion of the property by Mrs. Bolton does not seem to be requisite. The conclusion reached by the trial judge in respect to her, upon the facts stated in his findings and in his

opinion, and the conclusions stated in his opinion, must be regarded as a sufficient warrant for the conclusion we have reached upon the evidence in respect to the judgment so far as it relates to Mrs. Bolton, and we are of the opinion that as to her the decision made by the trial judge should be sustained.

We come now to the question made in respect to the dismissal of the complaint as against Sherwood. As we have already stated, the object and purpose of his purchase were to secure payment of an indebtedness which he held against Thomas Bolton, and it was competent for him to accept payment, or secure payment by the purchase of property at a fair valuation, or, in the language as stated in the opinion of BRADLEY, J., which we think is correct, viz.: "A debtor has the lawful right to transfer property to any and less than all his creditors in payment of his debts owing to them, and they to accept it in payment to the exclusion of other of his creditors, provided it is done in good faith for such purpose and has a reasonably adequate consideration in the amount of the debts for the payment of which the transfer of the property is made. (*Wilder v. Winne*, 6 Cow. 284; *Auburn Ex. Bank v. Fitch*, 48 Barb. 344; *Loeschigk v. Hatfield*, 5 Robt. 26; 51 N. Y. 660; *Hale v. Stewart*, 7 Hun, 591; *Murphy v. Briggs*, 89 N. Y. 446.)"

The evidence warranted the finding stated in the following language by the trial judge: That "said purchase was made by said Sherwood with no other purpose or intent on his part than to obtain payment of said Bolton's indebtedness to himself in preference to other creditors;" and the further fact that Bolton did not in any manner reserve to himself any right or interest in the property so acquired by Sherwood; and the further finding "that said Thomas Bolton made the said transfer to said Sherwood for the purpose of paying his indebtedness, and without any intent or expectation of ever receiving to his own use any part of the undivided half of said property sold and transferred by him to Sherwood, and without reserving to himself any benefit therefrom except that which would incidentally follow if he could have the business continued, and the half which he transferred to his wife employed therein."

Those findings are not inconsistent with any principle laid down in *Hardt v. Schwab* (72 Hun, 110), as in that case it clearly appeared that the transfer was "for the benefit of the failing debtor."

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After the defendant Sherwood had shown that he became a purchaser for a valuable consideration, it was incumbent upon the party making the attack upon the purchase by him to show "that he had previous knowledge of the fraudulent intent of the vendor, or that he participated in the fraud." (*Starin v. Kelly*, 88 N. Y. 418; 2 R. S. 137, §§ 1, 5.)

By the terms of the agreement of August 2, 1893, the status of the defendant Sherwood became fixed, and there is no force in the suggestion that because he had not actually surrendered all of the notes which formed a part of the consideration of his purchase, some of them having been discounted, he was not a purchaser for a valuable consideration.

The cases of *Macauley v. Smith* (132 N. Y. 525) and *Sargent v. Eureka Spund Apparatus Co.* (46 Hun, 19) are inapplicable to the case in hand.

Nor does *Ross v. Caywood* (16 App. Div. 591) aid the contention of the appellants. In that case it was said that the responsibility of a vendee for the fraud of his vendor might be established by actual knowledge or notice, or inferred from circumstances. In the case in hand all the facts and circumstances, and all the evidence tending to indicate any knowledge or notice of a fraudulent intent on the part of the vendor, as against the agreement so far as it related to Sherwood, were considered by the trial judge, and, notwithstanding such evidence, the conclusion was reached that the defendant Sherwood had no fraudulent intent on his part in becoming the purchaser of the property, but that his leading motive and principal object was to acquire payment of his debt which he held against Bolton.

The legal effect of the agreement which was made by Sherwood was that the purchase price named therein, so far as he was concerned, was paid at the time of the execution of the agreement. By the language used therein Sherwood agreed to surrender the evidences of the indebtedness held by him and agreed to indemnify Bolton against the same, and within a reasonable time he carried out the agreement.

The evidence very clearly indicates that Sherwood was negotiating for the purchase of an undivided half of the property, and that his leading, principal and constant effort was to secure the payment

of the indebtedness which he held against Bolton, and that in consummating that purpose he was compelled to acquiesce in the purchase made by Mrs. Bolton of the other half of the property. By that purchase he became a tenant in common of one-half of the property. His title thereto was just as clear and distinct as though separate instruments had been provided, one assigning one-half of the property to him and the other assigning one-half of the property to Mrs. Bolton; and it is to be kept constantly in mind that the consideration moving from the one to Bolton and the consideration moving from the other to Bolton were distinct and separate. The case is, therefore, unlike those where there is a taint to the whole consideration.

It differs from *Read v. Williams* (125 N. Y. 560), where the false and fraudulent consideration was fabricated by the joint act of both grantor and grantee.

The case in hand is unlike *Russell v. Winne* (37 N. Y. 596), as in that case it was said: "The mortgage was one single instrument given to secure one debt," and it was, therefore, appropriately held that the unlawful intent pervaded the whole instrument.

The bill of sale and the agreement made on the 2d of August, 1893, must be construed in the light of the facts and circumstances attending their execution, and when they are considered the situation is the same as though Sherwood had given his check for the value of one-half of the property innocently and honestly with an intent to acquire the title thereto, knowing nothing of any fraudulent intent on the part of the assignor in respect to the sale of the other half of the property. We think his purchase may legitimately be upheld.

In *Smith v. Post* (3 T. & C. 650) it was said: "Although two parties are secured separately in one instrument, it must be considered as a transfer separate and distinct, which enables each one to hold the property independent of the other, in proportion to the debts secured. The same rules apply to conveyances of real estate. (Bump on Fraudulent Conveyances, 472.) Also to assignments of property. (*Prince v. Shepard*, 9 Pick. 176)."

In the case cited from 9 Pickering, 176, Prince had transferred to Hodges and John C. Prince property to secure their respective indebtedness, and, although it turned out that there was no indebted-

ness to Hodges, the transfer, so far as he was concerned, was held to be fraudulent, and in delivering the opinion of the court Chief Justice PARKER observed: "It is insisted that, as the debt to the plaintiff was attempted to be secured in the same instrument as the feigned debt to Hodges, the assignment is void in the whole, so that the plaintiff can claim nothing under it. This must depend upon the nature of the transaction and of the instrument by which the assignment was made and the connexion of the parties to whom the property is conveyed."

Applying the test laid down by the learned judge, we are of the opinion that the case in hand falls within the principle approved. Here we have a creditor confessedly holding a just claim against his debtor, knowing that his debtor is in somewhat embarrassed circumstances and that his means of paying the debt rest largely in the plant and property which he owns, and the creditor, with a view of obtaining satisfaction of his debt, acts according to the usual business impulses in such cases and treats with his debtor, and finally reaches a conclusion that he will take one-half of the plant and property offered in liquidation of the indebtedness and liabilities which he held against his debtor. Such negotiations result in a conclusion on the part of the debtor that he will assign the half of the property to the creditor simultaneous with his assignment of the other half of the property to another creditor, to wit, his wife, and while that negotiation is transpiring the debtor vigorously asserts that he is indebted to his wife and that she is justly and honestly a creditor to the value of the other half of his property which is proposed to be transferred to her.

It is not difficult to suppose that Sherwood was credulous and believed the assertions that were made to him in respect to the indebtedness to the wife. However, his uppermost and earnest intent evidently was the acquisition of property, the value of which should liquidate the indebtedness and liability of Thomas Bolton to him. We think his purchase should be sustained. We have looked at the exceptions taken during the progress of the trial and find no occasion to interfere with the decision made by reason of any rulings made in the progress of the trial.

The trial judge has, in an opinion, very clearly stated his views of the law of the case.

The foregoing views lead to the conclusion that the results reached at the trial should be sustained.

That part of the judgment which dismisses the plaintiffs' complaint upon the merits as to Frederick A. Sherwood affirmed, with costs against the plaintiffs. And the judgment, so far as it is appealed from by Catherine Bolton, is affirmed, with costs to the plaintiffs against her as appellant.

All concurred, except FOLLETT, J., not sitting.

That part of the judgment which dismisses the plaintiffs' complaint upon the merits as to Frederick A. Sherwood affirmed, with costs against the plaintiffs, and the judgment, so far as it is appealed from by Catherine Bolton is affirmed, with ten dollars costs to the plaintiffs against her as appellant.

THOMAS E. LAWRENCE, Appellant, v. GUSTAVE A. SCHAEFER,
Respondent.

Fire insurance, Lloyds system — an action must be brought against the attorney of the underwriters alone — actions cannot be brought, in the first instance, against all the underwriters.

A stipulation, contained in a fire insurance policy issued under the Lloyds system, providing that no action shall be brought to enforce the policy except against the attorney of all the underwriters, himself one of them, they agreeing to abide the result of such single action as fixing their individual responsibility, is valid, and several actions cannot be brought upon the policy, in the first instance, against the several underwriters individually.

Such a provision does not oust the court of jurisdiction, and is in avoidance of a multiplicity of actions, the merits of any controversy in reference to the policy being finally determined as to all the underwriters in such action against the attorney.

APPEAL by the plaintiff, Thomas E. Lawrence, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Erie on the 13th day of January, 1897, upon the decision of the court rendered after a trial at the Erie Trial Term before the court without a jury.

Action upon a Lloyds insurance policy bearing the name of twenty-five underwriters, executed by C. Hagen, as attorney in

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fact, for the twenty-four underwriters, and by himself as one of the twenty-five.

The policy provided, among other things, viz.: "No action shall be brought to enforce the provisions of this policy, except against the attorney, and representing all, of the underwriters, and each of the underwriters hereby agrees to abide the result of any suit so brought as fixing his individual responsibility hereunder. Judgment entered in such an action shall be satisfied out of the unexpended premiums in the hands of the underwriters. If such premiums shall be insufficient, then out of the deposit made by the several underwriters, as hereinbefore expressed and limited; but in no case shall the judgment bind the property of the said attorney to a greater extent than his liability as an individual underwriter."

A loss occurred and was adjusted and apportioned, and proofs of loss were furnished to the company "and the proportionate liability of each underwriter is the sum of \$83.46."

The court found as a fact, viz.: "That no suit has been brought against Hagen as attorney.

"That each underwriter has been separately sued on this policy, and twenty-five actions are now pending, including one against said Hagen, as one of said underwriters." The cause of action was duly assigned to the plaintiff.

The court found as conclusions of law, viz.: "I find and decide that before any action can be maintained against the underwriters, individually, to recover upon said policy and to assert any liability against them as individuals, their attorney in fact must first be sued, as stipulated in said policy.

"2. That the clauses in said policy, hereinbefore recited, requiring actions for the enforcement of said policy to be commenced primarily against the said attorney, C. Hagen, are valid, and compose part of the contract between the underwriters and the assured."

Upon such conclusions of law the complaint was dismissed, with costs.

The trial judge, in an opinion, correctly stated the facts and elaborately discussed the questions of law.

George S. Hull and *Sidney W. Petrie*, for the appellant.

A. J. Robertson, for the respondent.

PER CURIAM:

The conclusion stated in the findings and opinion of SPRING, J., seem to be sustained by *Leiter v. Beecher* (2 App. Div. 577) and *New Jersey & Pennsylvania Concentrating Works v. Ackermann* (6 id. 540).

The attorney, C. Hagen, was also an underwriter, and, hence, the case differs from *Farjeon v. Fogg* (16 Misc. Rep. 220).

The logic of the *Leiter* case seems to indicate that the restrictive language used in the policy is not void as against public policy; and the opinion delivered by SPRING, J.,* applies the doctrine of that case, as well as the case of *Concentrating Works v. Ackermann* (*supra*), to the questions here presented, and sustains the conclusion reached by the trial judge.

If the foregoing views are correct, the judgment entered thereon should be sustained.

All concurred, except HARDIN, P. J., not voting, and FOLLETT, J., not sitting.

Judgment affirmed, with costs.

* The following is the opinion of SPRING, J., at Special Term:

SPRING, J.:

This action was tried without a jury, and involves the question of the right of the insured in a Lloyds policy to sue each of the underwriters to recover for a loss within the terms of the policy.

The policy in suit was issued by twenty-five underwriters, and is signed, not by them personally, but by C. Hagen, their attorney. By the terms of the policy, the personal liability of each underwriter is limited to \$200 in the event of loss, and is individual and several. Then occur the following clauses which comprise the nub of the controversy in this action:

"No action shall be brought to enforce the provisions of this policy, except against the attorney and representing all of the underwriters, and each of the underwriters hereby agrees to abide the result of any suit so brought, as fixing his individual responsibility hereunder." It is further provided that judgment shall be first satisfied out of the unexpended premiums in the hands of the underwriters, and if necessary, "then out of the individual liability of the several underwriters, as hereinbefore expressed and limited; but in no case shall the judgment bind the property of the said attorney to a greater extent than his liability as an individual underwriter."

A loss occurred under the policy in question, and it has been adjusted and twenty-five separate actions have been brought, one against each underwriter, and the attorney in fact, as such, has not been sued.

ALBERT L. KNAPP, Respondent, v. JAMES MURPHY, Appellant.

A judgment for the plaintiff in an action of conversion — when it is reversed, with costs, upon an appeal, the defendant is entitled to an execution against the person of the plaintiff.

A complaint in an action which alleges that, after the defendant had assigned to, and agreed to collect for, the plaintiff a sum due the defendant from a corporation, he wrongfully collected it and converted it to his own use, states a cause of action justifying an order of arrest under subdivision 2 of section 2895 of the Code of Civil Procedure, and the issue of an execution against the person of the defendant upon any judgment recovered therein; and where such a judgment in favor of the plaintiff is reversed upon an appeal, with costs, the defendant is entitled to issue upon the judgment for costs an execution against the person of the plaintiff.

APPEAL by the defendant, James Murphy, from an order of the Supreme Court, made at the Monroe Special Term and entered in the office of the clerk of the county of Ontario on the 8th day of February, 1897, setting aside an execution issued against the person of the plaintiff to the sheriff of Ontario county.

The primary question is as to the validity of the clause in the policy requiring the attorney to be sued as representing all the underwriters.

The policy in controversy is a contract between the insured and the insurers, and its stipulations and agreements will be given full force and effect unless they contravene some constitutional provision or are repugnant to public policy. The purpose of the requirement was obviously to prevent a multiplicity of actions, and in case there was a defense to be interposed, to have it fought out in one action. The aim or design is as important for the insured as for the underwriters. To compel the insured to begin twenty-five separate actions, each for a small sum, and against defendants widely scattered, and possibly in a Justice's Court, and with the privilege to the defendant to litigate the merits in each case, would impose upon the insured an expensive and difficult mode of realizing for his loss and with much uncertainty, for he might succeed in some cases and be defeated in others. And the underwriters would likewise be subjected to the burden of a contest in each case with great liability as to costs. So the provision is a prudent and desirable one for all concerned to have the merits of the controversy determined in one action.

The enforcement of this provision does not oust the courts of jurisdiction. It simply is a stipulation on the part of all the underwriters with the assured, that in the event payment is not made conformably to the terms of the policy, the insured may bring an action against Hagen, one of the underwriters, and that action will be decisive in determining the plaintiff's right to recover. That infringes upon no constitutional provision. One fair trial on the merits before a

Ellis & Griffith, for the appellant.

Henry M. Field, for the respondent.

HARDIN, P. J. :

On the 31st day of October, 1895, Knapp, the plaintiff and respondent, brought an action in Justice's Court in Ontario county, before A. DUNHAM, Esq., a justice of the peace, and lodged with the justice of the peace a written complaint containing the following words: "That on or about the 19th day of June, 1895, the said defendant, for value received, made, executed and delivered to the plaintiff an assignment and transfer of certain moneys that he was to receive from the Lehigh Valley Railroad Company, and thereby agreed to become the agent of the plaintiff for the collection of the said moneys, and immediately upon the collection of the same, on or about the 18th day of July, 1895, to pay the same over to the said plaintiff, free of all charge or expense. That on or about the 18th day of July, 1895, the said defendant collected and received the sum of \$35.00 from the Lehigh Valley Railroad Company, which

jury can be had. So the plaintiff gets an adjudication and the underwriters have their day in court. The attorney represents them as an executor or administrator represents the next of kin. The mode of ascertaining the rights of parties is often made the subject of stipulation. As was said *In re N. Y., L. & W. R. R. Co.* (98 N. Y. 447-453), "and generally all stipulations made by parties for the government of their conduct, or the control of their rights, in the trial of a cause, or the conduct of a litigation, are enforced by the courts." The counsel for the defendant argues that there is no way of enforcing the judgment after one is recovered.

Possibly suit may be necessary, but the merits cannot be retried. The stipulation must be taken *in toto*, and by it the underwriters expressly agree to abide the result of any action brought against the attorney, so that another suit would simply be a step in the procedure to enforce judgment like proceedings supplemental to execution, or any other remedy designed to insure or aid in the collection of a judgment. In full liability corporations resort must first be had to the corporate assets, and in case of failure to realize out of these, then the members of the corporation become liable, but it has never been regarded in contravention of public policy that the creditor must first proceed against the body corporate. Perhaps the more troublesome question is, even assuming the insured can proceed against the attorney, does that restriction absolutely inhibit suing the individual underwriters in separate actions? If force is to be given to the restrictive clause at all, it must be with the intent of carrying out the design of the parties to the insurance contract. Their agreement is that no action shall be

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was the money of this plaintiff. That this plaintiff immediately thereafter, and frequently since, has demanded the said moneys of the said defendant, and he has neglected and refused to deliver the same to this plaintiff. *That the said defendant has unlawfully and wrongfully converted the said sum of \$35.00, the property of this plaintiff, to his own use.*"

The summons was returnable on the 11th of November, 1895, and on that day the plaintiff appeared. The defendant did not appear. The plaintiff submitted the case "on his verified complaint," after proof that the interest amounted to seventy cents. The justice thereupon rendered a judgment for thirty-five dollars and seventy cents damages, and one dollar and ninety cents costs, and on that day issued an execution against the defendant, and delivered the same to the plaintiff, which was returned unsatisfied December 30, 1895.

In the affidavit of Mr. Griffith it is stated that the plaintiff was present before the justice when the judgment was rendered "and demanded the issuing of a body execution, and took the same himself to a constable of the said town of Manchester."

brought to enforce the provisions of the policy except against the attorney, and no casuistry can construe this stipulation into meaning that twenty-five actions can be brought to enforce the provisions of the policy. That was the very annoyance both parties were seeking to avoid, and as its foundation lies in a purpose to adjust their rights in court without a multiplicity of actions, the courts should fairly endeavor to make effective this object. Of course, if the scheme designed that no redress could be had against the underwriters, that the action against the attorney ends any attempt by legal proceeding to enforce the claim against the personal liability of the underwriters, then the provision would be nugatory and against public policy. It would then be a mere jumble of words to permit the underwriters to assume ostensibly a liability incapable of enforcement. But in construing this provision, as in every other, we must give a fair interpretation to the intent of the contracting parties. The scheme of insurance evidently contemplated there would be a general fund on hand to meet losses, and the personal liability of the underwriters was only to be available when the judgment could not be made out of the fund, so that it is again akin to the liability of stockholders of a full liability corporation. The underwriters contract to pay after their liability has been established in the manner provided, and after collection from the designated fund cannot be made. The inhibition against suing the underwriters is not absolutely unqualified, but "no action to enforce the provisions of the policy" is maintainable against the underwriters for that must be against the attorney; that is, the merits of any controversy that may arise within the compass of the contract must be determined in that action, and

An appeal was taken from the justice's judgment to the County Court of Ontario county, and the judgment was reversed by the County Court, and thereupon a judgment was entered in favor of the defendant for thirty-five dollars and twenty-five cents costs in the Ontario county clerk's office.

On the 23d of November, 1896, an execution was issued against the property of Knapp, the plaintiff, and delivered to the sheriff of the county of Ontario, and by him returned unsatisfied on the 16th of December, 1896, and on the 18th of December, 1896, an execution against the person of Knapp was issued to the sheriff of Ontario county, and Knapp "was duly arrested and taken into custody thereunder on the 29th day of December, 1896, by Lyman H. Aldrich, a deputy sheriff of Ontario county."

Whether the County Court properly reversed the justice's judgment is not a question to be considered on this appeal.

The gravamen of the plaintiff's complaint seems to be for a conversion of a sum of money, which the plaintiff alleges he had demanded of the defendant, and after such allegation made in the complaint, the plaintiff further alleges, viz.: "That the said defendant the stipulation of the underwriters to abide thereby cuts off any further litigation as to the provisions of the policy, and thereafter whatever proceedings are carried on are merely with a view of collecting the judgment. The clause is reasonably susceptible to this construction, and it has the merit of fairly spelling out the purpose of the parties to it.

It seems to me that Hagen is not merely an agent or attorney in his contractual relations with the insured. He is one of the underwriters, and in this particular the case may be distinguishable from the celebrated case of *Knorr v. Bates* (14 Misc. Rep. 501). He is the particular underwriter who is designated in the policy to bear the brunt of any litigation that may arise to enforce the provisions of the policy, and his ultimate liability is like that of his associates.

These Lloyds policies have grown into extensive use recently, and clauses of like purport to the one here in controversy have been several times the subject of judicial construction, but unfortunately without unanimity of opinion.

In *Knorr v. Bates* (12 Misc. Rep. 395; 24 Civ. Proc. Rep. 377; *affd.*, 14 Misc. Rep. 501) the clause was almost identical with the one in suit, and the only distinction seems to be that in that case the attorney was not an underwriter, and the reasoning both of the judge at Special Term and of Judge PRYOR lays considerable stress upon the fact that the attorney was not a party to the contract. In that case the clause was held to be invalid. This has been followed in the City Court of New York. (See *Ralli v. Hillyer*, 15 Misc. Rep. 692.) And in case of *Flurjeon v. Fogg* (16 id. 219), Judge TRUAX, in the Special Term of the Supreme Court, decided a similar clause to be invalid, putting his conclusion

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has unlawfully and wrongfully converted the said sum of \$35.00, the property of this plaintiff, to his own use."

Upon recovery by the plaintiff under such a complaint, he was entitled to issue a body execution. Indeed, such seems to have been the construction of his complaint by him when he held a judgment against the defendant.

In subdivision 2 of section 2895 of the Code, which provides for an order of arrest, it is specified that where the recovery is for "an injury to property, including the wrongful taking, detention or conversion of personal property," an order of arrest may be granted.

In *Babcock v. Smith* (19 N. Y. Supp. 817) it was held that the section from which the quotation has been made, that where the cause of action is for the wrongful conversion of personal property, the same is one of the sections specified in subdivision 2, section 2895 of the Code of Civil Procedure.

Under a complaint somewhat similar to the one before us, it was held in *Furrelly v. Hubbard* (148 N. Y. 592) that it authorized the issuing of a body execution. In the course of the opinion delivered it was stated: "As already stated, the action in Justice's Court was

squarely upon the ground that the stipulation required the action to be brought against a person not a party to the contract, and the provision was, therefore, void as inimical to public policy.

In *Leiter v. Beecher* (2 App. Div. 577) and in *New Jersey & Penn. Concentrating Works v. Ackermann et al.* (6 id. 540) the Appellate Division of the first department decided similar clauses to be valid, although an endeavor was made to distinguish those cases from *Knorr v. Bates* (*supra*).

The contention pressed by the counsel for the plaintiff, that the twelve months' limitation in which actions must be commenced would operate to prevent the insured recovering against the underwriters at all, is not applicable to this case, as was well said in the case last cited. The limitation has reference solely to the action against the attorney in fact, and not to any proceeding to enforce an established judgment.

Again, it occurs to me that Hagen is a trustee of an express trust within the purview of section 449 of the Code of Civil Procedure. The contract was made with him, and, so far as the other underwriters are concerned, for their benefit. While that section, on its face, is in terms permissive in allowing actions to be prosecuted, yet a similar provision of the Code was held to warrant suits to be maintained against the trustees. (*Mead v. Mitchell*, 5 Abb. 92-106; *affd.*, 17 N. Y. 210.)

That is the general doctrine, that an executor, administrator or person expressly authorized by statute to sue can be prosecuted by action in pursuance of the same authority that accords him the privilege of invoking the aid of the courts.

The complaint must be dismissed, with costs. Ordered accordingly.

for conversion and within the second subdivision of section 2895 of the Code of Civil Procedure, if the act of the plaintiff in this action in failing to pay over the money collected by him was, as matter of law, conversion."

In the case in hand it was the duty of the defendant, upon receiving the money mentioned in the complaint, "to have immediately carried the money or check to his assignee, and not doing so he became liable for conversion upon failure to pay over on demand."

The case from which the quotation has just been made is authority for issuing a body execution in the case in hand.

Carrigan v. Washburn (14 Civ. Proc. Rep. 350), cited by the respondent, is not applicable to the case in hand. That was a case where the plaintiff's right to arrest the defendant did not depend upon the nature of the action, but upon extraneous grounds.

Nor does *Roeber v. Dawson* (14 Civ. Proc. Rep. 354) aid the contention of the respondent. In that case it is said: "The plaintiff in this case could not recover without proof beyond the complaint allegations."

In *Longuemare v. Nichols* (7 N. Y. Supp. 672) it was held that "where a plaintiff is defeated, and defendant seeks to pursue him on a judgment for costs, plaintiff becomes a defendant, within Code Civil Procedure, N. Y. section 572."

Whenever a plaintiff brings an action in tort and seeks to recover in tort, if he is defeated and the defendant recovers costs, he is entitled to have a body execution. (*Philbrook v. Kellogg*, 21 Hun, 238.)

The doctrine which we have already adverted to was approved in *Parker v. Spear* (62 How. Pr. 394), and it was said that the principle aptly illustrates the truth of the old proverb that "those who take the sword should perish by the sword."

It seems from the affidavit that the plaintiff was willing to obtain a body execution after he had obtained judgment against the defendant while it remained unreversed.

The foregoing views lead to the conclusion that the Special Term fell into an error when it set aside the body execution issued against the plaintiff.

We think the order should be reversed, and the defendant should be allowed to pursue his remedy against the plaintiff to recover the costs of the action.

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Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.

All concurred.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.

JOHN F. DORTHY, Appellant, v. JOHN R. STRAUCHEN and MARY STRAUCHEN, Respondents.

Instruments executed about the same time, not construed together when they relate to different properties.

Seemle, that the rule that, where two instruments are intended to embody a contract between the parties, they must be read and construed together, and that the fact that they bear different dates is immaterial, if the contract is not carried into effect until both are executed, does not apply to instruments executed upon several successive days which relate to different properties.

APPEAL by the plaintiff, John F. Dorthy, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of Monroe on the 3d day of January, 1896, upon the decision of the court rendered after a trial at the Monroe Special Term.

The court found as conclusions of law, viz. :

"1. That the plaintiff is entitled to judgment that the said mortgage, executed as aforesaid and recorded as stated in the 17th finding of fact, shall be delivered to him and cancelled, and that the record thereof by the county clerk of Monroe county shall be cancelled.

"2. That the defendant is entitled to judgment that the conveyance by said Dorthy and wife to him on the 26th day of April, 1895, of the Tonawanda property is valid and operative for the purposes for which the same is given, and that the conveyance of the first day of May, 1895, from Dorthy and wife to the defendant Strauchen, which was delivered on the second of May as aforesaid, is also valid, and that as to those two conveyances the defendant Strauchen is the owner thereof."

On the 3d day of January, 1896, judgment was entered in accordance with the decision.

On the 11th day of January, 1896, the judgment was amended by striking therefrom that portion relating to the *lis pendens* filed in Erie county.

On the 3d day of February, 1896, the plaintiff appealed "from the whole and from each and every part of said judgment."

In the brief submitted it is stated, viz.: "The plaintiff does not ask to review that part of the judgment which directs the cancellation of the mortgage described in the judgment."

The court made quite extended findings of fact.

Eugene Van Voorhis, for the appellant.

Joseph W. Taylor, for the respondents.

HARDIN, P. J.:

An extended and elaborate argument has been made by the appellant in respect to the pivotal questions of fact arising at the trial upon a large volume of evidence.

In behalf of the appellant it is insisted that the court has gone wrong upon the facts which lie at the foundation of the decision.

In behalf of the respondents an extended argument has been submitted to the court upon the facts, testimony and features of the case for the purpose of supporting the conclusions of fact stated by the trial court.

After much reflection upon the various phases of the case as presented in the arguments of the learned counsel, and a cautious inspection of the evidence and a perusal of the findings of fact and the elaborate opinion delivered by the trial judge, we find no occasion to interfere with the findings of fact stated in the decision.

The trial court had the advantage of the presence of the witnesses, observing their demeanor during the long trial that ensued, and, judging by the opinion delivered, fully appreciated the different lines of evidence presented, and has stated conclusions which seem reasonable.

Giving to such decision such influence as we think it fairly is entitled to in connection with our examination of the evidence, we are of the opinion that the findings of fact ought not to be dis-

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turbed. (*Teeter v. Teeter*, 47 N. Y. St. Repr. 580; *Cook v. N. Y. El. R. R. Co.*, 63 id. 18 and cases cited; *Sackett v. Thomas*, 4 App. Div. 448.)

It is insisted in behalf of the appellant that the transactions disclosed in the evidence must be viewed as a whole and all of the papers examined in connection with each other. The transactions relating to the papers mentioned in the pleadings and disclosed in the evidence transpired upon several days from the 26th of April, 1895, forward. The instruments executed, however, related to different properties.

In the case of *People v. O. B. & S. B. B. Co.* (92 N. Y. 98) the deeds that fell under construction related to the same property, one from an executor to a third person and the latter back to the executor, under whom, as an individual, the vendor claimed.

The case of *Knowles v. Toone* (96 N. Y. 534) states the rule as follows: "Where two instruments are intended to embody a contract between the parties they must be read and construed together; the fact that they bear different dates is immaterial if the contract is not carried into effect until both are executed."

We think the trial judge sufficiently observed the rule, and that his opinion clearly indicates that he followed it in his examination and determination of the facts.

Nor do we think the trial judge committed an error in inserting in the findings of fact, viz., "that whether or not the conveyance to Strauchen was an absolute conveyance, or whether the same was by way of mortgage, does not clearly appear."

It is quite obvious, from the scope of the complaint, that the pleader alleged that the securities which the defendant received were taken by way of mortgage. The evidence indicates that at the time the deed of the 26th of April, 1895, was made, the plaintiff was largely indebted to the male defendant, and that the defendant had, besides advances directly made, become surety upon plaintiff's paper.

The mortgage of the 29th of April, 1895, was not, in terms, for \$10,000. In the consideration clause were the words: "In consideration of the sum of one dollar and other valuable consideration." And in the condition clause were the following words: "This grant is intended as a continuing collateral security for the payment to the

said party of the second part of any and all notes, checks and other obligations made or incurred by the said John F. Dorthy, party of the first part, to the party of the second part, and for any renewal or renewals thereof, and for any charges or expenses that the party of the second part may incur for the benefit of the said John F. Dorthy, and to save harmless the party of the second part from all loss, cost and damage that he may sustain, either as indorser of any such note, check or other obligation of the said John F. Dorthy, or as holder and owner thereof or of any part thereof." Although the deed of April twenty-sixth was in form absolute, as appears by an inspection of it, we think, notwithstanding the defendant had alleged in the answer that the deed was absolute, the trial judge committed no error in inserting the clause in his findings of fact, which has been quoted. And we think that no error is presented by the use of the following words, viz., "whether the same was by way of mortgage does not clearly appear."

The plaintiff not having asked in his complaint to redeem from the deed, it was not important that the question as to his right to so redeem should be determined in this action.

The foregoing views lead to sustaining the result reached at the Equity Term.

All concurred, except FOLLETT, J., not sitting.

Judgment affirmed, with costs.

CHARLES E. MILLEN, Respondent, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

Negligence — a brakeman falling at night into a sluiceway in a railroad yard while coupling cars — the question whether the railroad furnished a safe place is for the jury.

Proof that a brakeman, who had been employed by a railroad corporation for only fifteen days, after reaching a railroad "yard" containing seven tracks, through which he had already passed several times, while attempting at night to couple some additional cars to a car of his own train, either slipped, or stepped into an uncovered sluiceway about eight inches deep and fourteen inches wide, of whose existence he was ignorant, lost his balance and injured his

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hand, which, as he fell forward, caught between the deadwoods of the cars, presents a question for the jury whether the railroad corporation was negligent in failing to furnish its employee a reasonably safe place for the discharge of his duties.

APPEAL by the defendant, The New York Central and Hudson River Railroad Company, from a judgment of the Supreme Court in favor of the plaintiff for \$2,600, entered in the office of the clerk of the county of Onondaga on the 20th day of October, 1896, upon the verdict of a jury, and also from an order entered in said clerk's office on the 16th day of October, 1896, denying the defendant's motion for a new trial made upon the minutes.

The action was brought to recover for personal injuries sustained by the plaintiff while in the employ of the defendant as a brakeman at the Oneida depot.

Frank Hiscock, for the appellant.

Julie R. Jenney, for the respondent.

HARDIN, P. J. :

On the 31st of December, 1891, the plaintiff had been in the employ of the defendant, as brakeman, for fifteen days, and on the evening of that day he was the rear brakeman, or flagman, upon a local pick-up train, making its way from East Syracuse to Utica as a pick-up train, and from Utica to Albany as a through train. When the train reached Oneida there was occasion to leave some cars, and the usual process of kicking the cars on to a siding was gone through with by the trainmen, and then it was their business to pick up some stationary cars and put them into the train in the discharge of their duties.

It is alleged in behalf of the plaintiff that, having placed a link in the drawhead of a standing car, he proceeded, in pursuance of the duty imposed upon him, to signal the engineer to move back certain cars from the east towards the west, with a view of uniting them with the still car, and, after giving the signal to the engineer, he approached the opening between the still car and the cars approaching under the motion given to them by the engineer, in pursuance of the signal, and that as he entered between the two cars to complete the connection of the moving cars with the dead

car, by adjusting the link and pin, he slipped and lost his balance, plunged forward, caught his hand between the drawheads, or the deadwoods, and received the injuries which occasioned him to lose most of his right hand.

There was a controversy at the trial as to the precise location of the attempted connection of the two cars. The evidence given by the plaintiff as a witness, and by other testimony relating to that question, was quite seriously contradicted by the testimony of the witness Newman, and the trial judge clearly and pointedly submitted the conflict raised by the evidence offered by the plaintiff and the evidence furnished by the defendant, and the verdict has settled that question of fact, upon sufficient evidence, in favor of the plaintiff.

The next important question of fact which was presented for the consideration of the jury was as to the nature and character of the sluiceway, ditch or trench which, according to the evidence of the plaintiff, was left by the defendant in its yard where the coupling was required to take place, and into which the plaintiff alleges that he slipped or stepped and caught himself, and, by means of the slipping, the injuries were occasioned, and "his fingers smashed between the drawheads."

In behalf of the plaintiff it was shown that the sluiceway was an opening of from eight to ten inches deep, and some fourteen inches wide; that the night was dark, and that the hour when the accident occurred was between half-past seven and eight on the night of the 31st of December, 1891, there being some snow and slush upon the ground. The evidence offered by the plaintiff tended to support the allegation that, by reason of the sluiceway or ditch, the plaintiff lost his balance and received the injuries of which he complains.

It was clearly and pointedly submitted to the jury to find whether the sluiceway caused the injury of which he complains, and their verdict in that regard, favorable to the plaintiff, is supported by ample evidence.

The sluice or ditch was uncovered, and the defendant sought to exculpate itself from the charge of negligence by producing evidence to the effect that the sluiceway was constructed for a proper purpose, and that its construction was in accordance with an exten-

sive practice on its road and on other roads. Considerable evidence supporting the averment in that direction made by the defendant was received, and submitted to the jury for their consideration. The learned trial judge instructed the jury that it was the duty of the defendant to furnish a reasonably safe place to the plaintiff for the discharge of the duties imposed upon him, and left the question of fact, in that regard, to the jury. Upon that question the fact that the yard consisted of seven tracks, and the darkness of the night, the slush and snow, the nature of the duty imposed upon the plaintiff, and all the circumstances relating to the employment of the plaintiff and the facilities furnished by the defendant, in respect to the place where he was to discharge the difficult and dangerous duty of coupling cars, were adverted to in considering that question when the case was submitted to the jury. The jury were specifically instructed that, if no negligence was found on the part of the defendant in regard to the sluiceway, then there could be no recovery. If, on the other hand, they reached the conclusion, upon all the evidence, that the sluiceway or ditch rendered the place where the labor of the defendant was to be performed unsafe and dangerous, then their verdict might be that the defendant had failed to discharge its duty in the premises. Apparently the court gave the defendant the benefit of every branch of its evidence, and of all the circumstances which made in its favor, upon all the important questions of fact that were presented to the jury, and the jury was expressly instructed that, upon all the evidence, before the plaintiff could recover, it must be found that the plaintiff was free from contributory negligence.

We are of the opinion that the trial proceeded upon well-settled principles of law, and in accordance with the doctrine laid down in reported cases.

In *Plank v. N. Y. C. & H. R. R. R. Co.* (60 N. Y. 607) the plaintiff's evidence tended to show that "as deceased was engaged in the act of coupling, he stepped into a sluice-way or trench, about two feet wide and deep, which run under the tracks. * * * It was in the night season and there was snow on the ground. It also appeared that the train of the deceased had been in the habit of stopping there, and that he knew of the trench. The trench, it appeared, had been there over ten years, in the same condition,"

and in delivering the opinion to the effect that the nonsuit granted was erroneous, it was said: "That defendant was bound to provide an ordinary and reasonably safe place for the performance of the work of coupling cars; that the jury might have found that the plank across the trench was not a safe or convenient standing or walking place for one engaged in that work, as it was midway and right under the attachment by means of which the cars were coupled, and that the trench made the place unsafe to a brakeman whose hands and eyes were engaged in the act of coupling, * * * and that the evidence of defendant's negligence was sufficient to require the submission of the question to the jury; also, that the fact of the knowledge of the deceased of the existence of the trench was not sufficient to charge him, under the circumstances, with contributory negligence, as the act in which he was engaged necessarily required his whole attention and thought."

In *Harr v. N. Y. C. & H. R. R. R. Co.* (13 N. Y. St. Repr. 227; S. C. affd., 23 id. 192) it appeared that the accident occurred while plaintiff was "endeavoring in the night to couple cars, and was walking between or beside the cars in motion, which he was attempting to couple when he slipped and fell." In the opinion delivered in the General Term numerous cases are referred to and cited in harmony with the *Plank* case, and the opinion then delivered was expressly approved by the opinion delivered in the Court of Appeals.

The doctrine of the *Plank* case was again approved in *Fredenburg v. N. C. R. Co.* (114 N. Y. 582), and it was there said that it was the duty of the defendant "to use care to make that place reasonably safe for the service of its employees;" and in that case the following language is found: "It is urged that the plaintiff was bound to make himself acquainted with the situation presented by the various structures about the yard and their condition. It is quite true that his duty was to use due diligence to familiarize himself by observation with the structures, and their situation and condition in the yard, with a view to his own safety in the performance of his duty and for the protection of himself against injury. But his recent entrance into the service, and the fact that his duties hitherto had not called him to the place in question, enabled the jury to find that his failure to escape the injury was not attributable to any want of diligence on his part in that respect."

In the case in hand the evidence is, that the plaintiff had been in the employ of the defendant only fifteen days, and while he had been through the Oneida yard several times, there is direct and positive testimony that he was not aware of the sluiceway where he alleges the injuries were received, and the evidence warranted the jury in finding that he had no knowledge of the presence of the sluiceway and the dangers incident to its presence in the yard where he was required to couple cars.

In support of the theory of the defendant it called two of its roadmasters, who gave evidence as to the existence of similar structures along its roadway.

Roadmaster Angell testified: "I know of nothing which prevents the covering of those sluiceways. It would be very easy to cover them, and, from my judgment as a roadmaster from long experience, they would be safer if they were covered."

Roadmaster Winfield testified that he had seen sluiceways and drains covered and some uncovered. He also testified, viz.: "If there was an eight-inch ditch right where a man was coupling cars I don't know whether I would regard it safer to cover it if a man was working there in the night time or not; he would be as liable to stumble over a box as he would to drop in a ditch. If the box was under the rail and on a height with the level of the yard, he would not be liable to stumble very much, there would be an opening there. * * * He would be about sixteen inches away from the track, but so far as being in between the rails is concerned he would be safer if that sluiceway was covered. * * * Where they are covered they are made with boxes put in underneath."

According to the evidence this yard had in and about it seven tracks, and there was occasion to couple and uncouple cars in and about this yard to a very large extent.

We think the evidence was sufficient to warrant the conclusion reached by the jury, that the defendant was guilty of negligence, and that the negligence of the defendant contributed to, or led to the injuries which the plaintiff received; and that the evidence fully warranted the trial judge in submitting the question of the plaintiff's freedom from negligence, as one of fact, to the jury. There was no error, therefore, in the trial court in refusing to non-

suit the plaintiff at the close of his evidence, nor in again refusing to dismiss the plaintiff's complaint and to grant a nonsuit at the close of the whole evidence.

The learned counsel for the defendant has called our attention to *De Forest v. Jewett* (19 Hun, 509). That case differs from the one before us inasmuch as the trial judge there, in effect, charged the jury that the defendant was liable for any error of judgment, although it exercised due care in determining the mode of constructing the ditch.

That case was affirmed in 88 New York, 264, and in the course of the opinion it was said: "He had been engaged as switchman and car coupler in the yard in question for nearly two years. He worked in the daytime. It appears that every one of these ditches or sluices were well known to him; he knew their location, and, so far as could be determined by seeing them daily, he knew their width and depth and the manner of their construction. Whatever there was of danger to one engaged in the coupling of cars in this yard must have been apparent and obvious to him. This is not a case, therefore, of a latent or secret danger unknown to the servant, but which should have been known to the master." The case differs from the one before us, because there is positive evidence in this case, as well as a verdict in favor of the evidence, to the effect that the plaintiff did not know of the ditch or sluice at Oneida where he received the injuries.

Nor do we see anything in *Harley v. B. C. M. Co.* (142 N. Y. 32) which sustains the position of the defendant. In that case it was said, the master "is not bound to furnish them (employees) an absolutely safe place to work in, but is bound simply to use reasonable care and prudence in providing such a place."

The tenor and spirit of the charge of the learned judge is entirely in accord with that doctrine, and it must be assumed here that the verdict is in accord with the principle laid down in that case. And the verdict seems to accord with the testimony of Roadmaster Angell, who said: "It would be very easy to cover them, and from my judgment as a roadmaster, from long experience, they would be safer if they were covered." This case differs from *Wright v. President, Managers, etc., D. & H. C. Co.* (40 Hun, 348), as there it appeared very clearly that the defect which was complained of was

known to the plaintiff "and no complaint was made by him, or notice given of the alleged defect."

Some criticism is made of some of the language used by the learned trial judge in his charge to the jury, and it is intimated that it was "an eager and earnest summing up for the plaintiff; practically a direction to the jury to give the plaintiff a verdict." Upon looking at the portion criticised, we are of the opinion that the learned trial judge sought to illustrate the issue to the jury and to give them a clear understanding of the rules of law which he had laid down to guide them in their deliberations upon the facts of the case. The exception that was taken was broad and general, and does not point out that the charge "erroneously expresses any rule of law." Besides, after the language which is adverted to in the criticism was used, the trial judge very squarely put it to the jury to determine, *first*, was the plaintiff guilty of contributory negligence? and, *second*, was the accident caused by the sluiceway; was the defendant guilty of negligence in permitting the sluiceway there to remain? We think, after reading the whole charge, the jury was very properly instructed as to the rules of law applicable to the facts before them. (*Smith v. Matthews*, 152 N. Y. 157, and cases cited in the opinion of BARTLETT, J.)

If the jury could have been induced to believe the testimony of Newman, the defendant's witness, the defense might have succeeded. However, as there was satisfactory evidence to the contrary of the testimony given by him, the verdict must be accepted as conclusive.

All concurred, except FOLLETT, J., not sitting.

Judgment and order affirmed, with costs.

ANNETTE C. HERSEE and CARRIE H. COIT, Plaintiffs, v. LOUIS W. SIMPSON, Defendant.

Vested remainders — construction of a clause of a will "from and after her decease my will is that all of my said property be disposed of according to the statutes."

A testator, after bequeathing and devising all his residuary estate to his wife for life, provided "from and after her decease, my will is that all of my said property be disposed of according to the statutes of the State of New York governing the descent of real property and the distribution of personal estates."

Held, that all persons who were his heirs at law at the time of the testator's death, took vested remainders in his real estate, the enjoyment of which, only, was postponed until the termination of the life estate of the widow.

SUBMISSION of a controversy upon an agreed statement of facts pursuant to section 1279 of the Code of Civil Procedure.

The question related to the title and ownership of certain lands situated in the city of Buffalo and particularly described in the submission papers.

William G. Newbrook, for the plaintiffs.

Fred W. Ely, for the defendant.

HARDIN, P. J. :

Thompson Hersee, on the 8th day of March, 1879, made and executed his last will and testament, and in December, 1884, he died at the age of seventy-one years, seized in fee simple of the real property described in the submission. He left him surviving a widow, the plaintiff, Annette C. Hersee, and a son, William M. Hersee, and a daughter, Carrie H. Coit, one of the plaintiffs, and no other children or issue of deceased children. William M. Hersee died unmarried, intestate, without issue in September, 1891. Annette L. Hersee, a granddaughter of the testator, died in infancy in 1882, unmarried and without issue, some two years before the death of the testator.

In the 1st clause of the testator's will he bequeathed \$10,000 to Annette L. Hersee, who was the daughter of his deceased son, Thompson Hersee, Jr., "on the condition that she live to be the age of twenty-one years, said conditional legacy to be paid to her on her

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arriving at the age of twenty-one years. But, if the said Annette should not live to be of the age of twenty-one years, then said bequest to be inoperative and of no effect."

Inasmuch as Annette L. Hersee died in 1882, the legacy to her became wholly inoperative.

In the 2d clause of the will the testator used language which gives rise to the question presented in this case. The language is as follows: "All the rest, residue and remainder of my estate, real and personal, of every name and nature (subject to the contingent payment of the above legacy), I bequeath and devise to my wife, Annette C. Hersee, to have, hold and enjoy the same, with the rents, issues and profits thereof, during the term of her natural life, and from and after her decease, my Will is that all of my said property be disposed of according to the statutes of the State of New York governing the descent of real property and the distribution of personal estates."

In the 3d clause of the will he nominated and appointed his wife, Annette C. Hersee, sole executrix

No trust was created by the terms of the will.

The language of the will seems very clearly to indicate the intention of the testator that his property should pass to his heirs at law and next of kin in accordance with the laws of the State of New York, except that the wife should have a life estate and enjoy the use of all his property (except such as might be required to pay the legacy) during her natural life.

The language used by the testator to carry out such intention seems to be somewhat inartistic, as it provides that, from and after the death of his wife, the testator's property should be enjoyed by those entitled to it under the laws of the State of New York governing the descent of real property and the distribution of personal estates.

By the use of the words "my will is that all of my said property be disposed of according to the statutes of the State of New York," the testator intended that the real property should be enjoyed by his heirs at law and that they should be let into the possession of the same immediately upon the termination of the life estate given to the wife.

The question to be determined is whether the real estate vested

at the death of the testator, or whether it should vest at the time of the death of the widow. In other words, whether his heirs at law, at the time of his death, took a vested remainder or a contingent remainder. We think they took a vested remainder.

By section 13 of the Revised Statutes (9th ed. vol. 2, p. 1790) it is provided as follows: "Future estates are either vested or contingent. They are vested, when there is a person in being, who would have an immediate right to the possession of the lands, upon the ceasing of the intermediate or precedent estate. They are contingent, whilst the person to whom, or the event upon which they are limited to take effect, remains uncertain."

That section was construed and applied in *Sage v. Wheeler* (3 App. Div. 40) by this court, and, in the course of the opinion delivered in that case, it was said: "A construction is to be preferred which will give meaning to all the language used by the testator, and also that shall avoid the disinheritation of remaindermen who may happen to die before the termination of the precedent estate."

In the language of the will under consideration there is a clear devise to the wife for life of the lands. The words subsequently used are not the words of devise of the remainder of the land in express language, but they indicate that the land was to be "disposed of according to the statutes of the State." In other words, the heirs of the testator were by him assumed to be entitled to his property under the laws of the State at the close of the life estate given to his wife. This construction leaves the fee as a vested remainder in his heirs at law at the time of his death, subject to the life estate in the wife, and enables us to give effect to the words "from and after her decease" as being intended to apply to the possession, or right of possession, of those who were embraced in the provisions of the statute as his heirs at law, and the words "be disposed of according to the statutes" are satisfied by assuming that they were intended to be used to relate to the property in the heirs after the close of the life of the wife, to whom was given a life estate.

If it be assumed that the testator intended that his children should take, under the laws of the State, his real estate, subject, however, to the devise of the life use thereof to his wife, the language used seems to warrant the court in so construing the will as to carry out that intention. We see nothing in the language indi-

ating that "futuraity is annexed to the substance of the gift." On the contrary, we are of the opinion that the devise to his heirs at law, in virtue of the statutes of the State, is absolute, and the time of enjoyment only is postponed to the termination of the life estate. And we think we may appropriately apply the language of BARTLETT, J., in *Miller v. Gilbert* (144 N. Y. 73) where he says in respect to a testator's will: "Dealing with his real estate, the testator evidently intended the widow was to have a life estate and the sons the fee * * *."

The construction which we have indicated is supported to a considerable extent by the following authorities: *Matter of Embree* (9 App. Div. 602); *Bowditch v. Ayrault* (138 N. Y. 222); *Goebel v. Wolf* (113 id. 405); *Van Nostrand v. Marvin* (16 App. Div. 28).

Our attention has been invited to *Matter of Allen* (151 N. Y. 243). The language found in the will there under consideration differs very essentially from the language of the will now before us. The language used there was of a contingent devise and the postponement was clearly evidenced by the language of the will, and the devise "was contingent upon the death of the father and mother of the testator before the death of his widow. It was only upon the happening of both of these events before her death that the devise to them was to take effect."

Bisson v. West Shore R. R. Co. (143 N. Y. 130, affg. 66 Hun, 604) differs from the case in hand, as there by the terms of a will the devise to the heirs was not, "by the terms of the will, to vest in possession until after the termination of the life estate given to the widow. That was the time fixed for the gift to take effect and then was the time when the persons would be ascertained, who, coming under the description of heirs of the testator, would be entitled to share with the heirs of his widow in the distribution of the estate." The language is unlike the language in the will before us.

In *Matter of Baer* (87 Hun, 483; affd., 147 N. Y. 353) the will under construction was held to indicate quite clearly that the testatrix "did not intend that the remainder should vest upon her death in the then living children and heirs of her brother, but should be postponed until the time for division and distribution arrived, and then to vest in such persons as answered to the description who sur-

vived." That was a case where "futurity is annexed to the substance of the gift," and it was held that it was the intention of the testatrix that upon the death of the daughter, for whose benefit the trust was created, without issue, "the remainder should be distributed among such of the children of her brother as might then be living, and the lawful heirs of such as might be dead." The case, we think, does not aid the contention of the defendant.

We are, therefore, of the opinion that the whole title to the real estate mentioned in the submission resided in the plaintiffs at the time of the execution of the contract mentioned in the submission. We are also of the opinion that the title was not "involved in so much doubt within the meaning of the rule" as to justify the purchaser in refusing to perform the contract which he had entered into with the plaintiffs, and upon his receiving the warranty deed executed by the plaintiffs, he would acquire title to the property mentioned in the submission and described in the contract executed by the parties to this action. (See *Matter of Baer*, 147 N. Y. 355).

We think judgment should be rendered in favor of the plaintiffs in accordance with the views already expressed.

All concurred, except FOLLETT, J., not sitting.

Judgment ordered for the plaintiffs, with costs.

DUNDEE NATIONAL BANK, Respondent, v. HENRY M. HUNTINGTON,
Appellant.

Payment — not effected by a transaction between the president of a bank and its debtor, also a creditor of the president, by which both debts are sought to be canceled.

A transaction had between the president of a bank and the maker of a note held by the bank, who, as an executor, held a mortgage upon real estate belonging to the president of the bank, by which the debt of the president was to be offset against the moneys due the bank upon such note, followed by the debtor's satisfaction of the mortgage (which had never been held by or pledged to the bank), the president's return to the debtor of his note and the substitution therefor by the president, among the assets of the bank, of a forged note purporting to be that of the debtor, does not establish payment of the note—especially when taken in connection with proof of subsequent delay upon the part of the debtor, upon written demands by the bank for payment of the note, to assert that he had paid it.

APPEAL by the defendant, Henry M. Huntington, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Yates on the 17th day of March, 1897, for \$1,462.84, besides costs, upon the report of a referee.

This action was brought to recover money alleged to be due the plaintiff from the defendant upon a promissory note and for money loaned and for money had and received.

H. C. Harpending, for the appellant.

D. A. Marsh, for the respondent.

HARDIN, P. J. :

Prior to the 6th day of June, 1892, the defendant secured from the plaintiff a loan of \$1,000, and he gave his promissory note therefor. On the sixth day of June he renewed the note and included in the renewal a small balance of indebtedness to the bank, delivering to the bank simultaneous with the renewal his promissory note for \$1,137.44, which was made payable to the plaintiff, being non-negotiable, and maturing April 1, 1893. That note was never, in fact, paid to the bank, nor the indebtedness secured thereby repaid to the bank.

It was found by the referee that the note "was taken from the bank by James Spicer, who was at that time president of the bank, which fact was made known to the defendant by the said Spicer; that the said Spicer deposited with the said bank another note, purporting to have been signed by defendant, for \$1,300.00, dated May 1, 1895, running for one year, payable to the plaintiff, with interest, the avails of which note were credited to the defendant, and canceled upon the books of the bank the obligation previously held against him; that the \$1,300.00 note was not the genuine note of the defendant, his signature being placed thereon by some other person." The defendant resided in Huntley, Minn.

According to the defendant's testimony he, some time in 1893, wrote to Mr. Spicer and asked him to send the note and balance due. In response to that letter Mr. Spicer wrote to the defendant a letter on the 18th of March, 1893, referring to the note held by the bank of \$1,137.44. At that time the defendant, as executor of

his brother's estate, held a mortgage upon certain real estate executed by Mr. Spicer, and in the letter alluded to Spicer stated, viz.: "I have taken the note from the bank and I hold it to pay the amount due on the mortgage. The amount due on note April 4th is \$1,193.94. If you send on the discharge please get a clerk cif, and upon arrival of same will figure up difference and square up."

On the seventeenth of May Spicer again wrote a letter to the defendant, in which he made a statement showing that there was due upon the note \$1,193.94, and the amount due on the "bond" was \$1,299.75, and the balance was \$105.81; and in that letter he included a check for \$105.81, and stated, viz.: "I will keep the papers all together, and when you come down we will look them over and any mistakes corrected."

The defendant, about the 20th day of March, 1893, executed a discharge of the mortgage and mailed the same to Spicer at Dundee; and the referee finds as a fact "that said discharge was given to the said Spicer upon the understanding upon the part of the defendant that the avails of the mortgage should be applied toward the payment of the defendant's indebtedness to the bank; that after receiving the said discharge the said Spicer sent to the said defendant, in Minnesota, a statement purporting to show the application of the avails of the bond and mortgage toward the payment of the defendant's indebtedness; that from such statement it appeared that the defendant's note of \$1,137.44, and the interest thereon, had been paid, and that after applying the avails of the bond and mortgage thereon there remained due the defendant \$105.81, for which sum the said Spicer sent his individual check, which, in due course of mail, was returned to Dundee and was paid out of the individual account of the said Spicer in the bank."

There was evidence given on the trial tending to support the findings of fact so far as we have quoted the same.

The referee also found: "That the Spicer bond and mortgage were not left with the plaintiff at any time as collateral security for the payment of the note, or of any indebtedness of the defendant in the bank." That finding is challenged by the defendant.

Mr. Shattuck, the cashier of the plaintiff, in the course of his redirect examination, testified: "The bank had no mortgage as collateral to the payment of this note."

When the defendant was cross-examined he testified, after referring to the mortgage: "It was never put up in the bank as collateral and never assigned to the bank."

The evidence of Shattuck and of the defendant amply support the finding made by the referee, that the "bond and mortgage were not left with the plaintiff at any time as collateral security for the payment of the note, or of any indebtedness of the defendant in the bank."

The referee has found as a fact: "That said note of \$1,137.44 was not paid by the defendant, or by any person in his behalf, to the plaintiff, and the money for which the same was given is still due and owing to the plaintiff." The evidence abundantly supports that finding of fact. During the examination of Huntington he said: "The Spicer mortgage was paid by installments. I remember receiving at one time \$500 and \$250. I said, the other day, that I had no recollection of sending a discharge in response to his letter. I don't now recollect anything of the kind. Am positive I did not. I wrote then to him to send the necessary papers and he never did." Subsequently the witness was confronted with the discharge papers executed by him, as executor of his deceased brother, bearing date March 20, 1893, which had been recorded in the clerk's office of Yates county.

On the 26th of July, 1894, Shattuck, the cashier of the bank, wrote to the defendant a letter in which he stated: "Your note of \$1,137.44 and interest amounting to \$1,193.94 on April 1st, 1893, at its maturity is still held by this bank and unpaid. I have several times in the past called Mr. Spicer's attention to it and suggested that he had better ask you to renew it, if you were not in shape to pay it, and thus save our carrying it as a past due paper, which looks objectionable in the eye of the gov't."

Subsequently, and on the sixth of August, the cashier addressed another letter to the defendant in which he stated: "The note in question you gave to the bank June 6, 1892, for \$1,137.44 and interest, payable April 1, 1893. Amount at maturity \$1,193.94. Mr. W. S. Booth and myself are two of the nine directors of the bank, Mr. Spicer being one. You know how he runs matters. Mr. B. and myself had half fancied that perhaps you had made some arrangement with Mr. S. whereby he was to provide for the pay-

ment of your note, and while our suspicions may be unjust, we did not think his explanation of the matter or his way of treating the note hardly natural, and at Mr. Booth's suggestion I wrote to you regarding it. I also show him this letter to you."

On the 20th of October, 1894, the cashier again wrote to the defendant upon the subject of the unpaid note, and added a postscript in which he stated, viz.: "Spicer said only two days ago, when looking over the notes, that he had just received a letter from you, etc., etc., and that it would soon be arranged."

We are of the opinion that the referee made no mistake in interpreting the evidence when he came to the conclusion that the debt to the bank had never been paid, and that by placing a forged note in form renewing the defendant's note, did not operate to discharge the debt due from the defendant to the bank.

Apparently the defendant understood that he was having a personal transaction with Spicer when he was negotiating with him for the collection of the mortgage and the liquidation of the indebtedness represented by the note. The transaction is wholly unlike the one under consideration in *Yerkes v. National Bank of Port Jervis* (69 N. Y. 383). In that case the defendant, the bank, had in its hands United States bonds, and the cashier for a sufficient consideration agreed to exchange the same for registered bonds. The bank neglected to execute the agreement and the bonds were stolen, and it was held the defendant was liable. We think the case does not support the contention of the defendant.

The transaction revealed in this case is quite unlike the one disclosed in *Phillips v. Merchants' National Bank* (140 N. Y. 556). In that case it was held that the cashier of the bank, having power to bind it by his checks for the purpose of converting its funds to his own use, drew checks, as cashier, upon the defendant, with whom his bank had a deposit account, making them payable to persons who were dealers with the bank; "that so far as defendant was concerned the intent of the cashier was the intent of his bank." The transaction there under consideration does not resemble the one brought to our attention by the record here

We think the evidence warranted the referee in reaching the conclusion "That the transaction between the defendant and Spicer in regard to the discharge of the mortgage and applying the avails of

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it to the payment of the indebtedness of the defendant in the bank, was one of a personal nature, and whatever was done in that regard by Spicer was apart from his relations as president of the bank." And this view of the case is corroborated and strengthened by the omission of the defendant to heed the letters of the cashier, which were written, calling his attention to the fact that the note remained unsatisfied ; that it was held by the bank against the defendant, and the efforts of the cashier to secure from the defendant the payment of the note, and the delay of the defendant in taking the position which he now seeks to insist upon, strongly indicate that the referee made no mistake in the interpretation of the whole volume of the evidence before him. We think his conclusion should be sustained.

All concurred, except FOLLETT, J., not sitting.

Judgment affirmed, with costs.

CHARLES I. EDDY, Respondent, v. FARMERS' MUTUAL INSURANCE
COMPANY of Orleans and Niagara Counties, Appellant.

Co-operative town insurance company—the property insured by, may be used anywhere where the use is customary—a trotting horse, insured in one county, destroyed by fire in another where he was being trained.

In the absence of special restriction, clothed in clear and unequivocal language, as to the territory within which property is to continue to be insured, the parties will be deemed to have contemplated that the property may be used in the ordinary way, and that, while thus used, the insurance shall attach to it wherever the property may be while the owner is using it in a customary way.

A policy of insurance, covering a trotting stallion, issued in the county of Niagara by a co-operative town insurance company authorized to do business only in the counties of Orleans and Niagara, in the application for which insurance the stallion is not stated to be in any building or any particular place, nor restricted by the policy from temporary or permanent removal by its owner from the county of Niagara, and to the knowledge of the company's agent, when the policy was issued, was expected to be trained subsequently in the city of Buffalo for racing, and which was destroyed by fire in said city of Buffalo, does not in terms constitute a violation by the company of the provisions of section 12 of chapter 573 of the Laws of 1886, forbidding the issue of a policy on "property out of the limits of the territory ;" nor is it an infraction of section 278 of chapter 38 of the Laws of 1892, as amended by chapter 907 of the Laws of 1896, forbidding such a company to "transact business" beyond the territorial limits mentioned in its certificate of incorporation.

APPEAL by the defendant, Farmers' Mutual Insurance Company of Orleans and Niagara Counties, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Niagara on the 11th day of November, 1896, upon the decision of the court rendered after a trial at the Niagara Trial Term before the court without a jury.

On the 17th of December, 1892, the defendant issued a policy of insurance to Charles F. Williams, of the town of Royalton, Niagara county, by the terms of which it insured his buildings and other property upon said farm, "including a trotting stallion four years old, named Red Gothard, then owned by him on said farm, against loss or damage by fire or lightning, the insurance upon said stallion being a separate item of insurance of \$500, and it was provided that such insurance should continue for the period of five years; and in and by said policy, the defendant agreed to pay such insurance to said Williams or his assignee in case of loss."

When the insurance was effected the agent of the defendant was informed that the stallion was a race horse, and "that he had been away from the farm in training, and that the owner expected to take him to the city of Buffalo for training the following year."

It is found as a fact that, in the latter part of March, 1896, the owner sent the said stallion to the driving park at Buffalo, to be trained "for a period of four weeks, after which time the horse was to be returned to said farm."

On the 4th of April, 1896, while the horse was in care of one McDonald, in one of the barns on the said Buffalo Driving Park, the buildings upon the park and their contents were destroyed.

It was found that the fire was not caused by the negligence of Williams, nor caused by anything in the policy of insurance prohibited; and that Williams had conformed to the policy, "and immediately after said fire caused notice to be given to the secretary of the defendant of said loss." That the defendant refused to pay, "upon the ground that it occurred without the counties of Orleans and Niagara."

Williams assigned his cause of action to the plaintiff and this action was commenced.

Judgment was entered upon the decision made by the court, and an appeal is taken therefrom, exceptions having been filed to the decision.

David Millar, for the appellant.

L. E. Filkins, for the respondent.

HARDIN, P. J. :

Defendant's answer alleges that it is a co-operative town insurance company, "and that in and by the certificate of incorporation it is limited to the territory embraced in the counties of Orleans and Niagara." It also alleges that Williams was a resident of the town of Royalton "and was the owner of a farm situated in said town, and was the owner of the stallion" in and upon said farm when the policy was issued.

It is further alleged in the answer that "it is prohibited from insuring or issuing any policy of insurance upon or in respect of any property out of the limits of the territory embraced within the limits of its certificate of incorporation." It then alleges that in the month of March, 1896, "Williams, in violation of the terms and provisions of said policy, and of the laws of this State, removed the said stallion from the limits of the territory embraced in the certificate of incorporation of this defendant, to wit, from the county of Niagara, and took the same to the county of Erie and to the city of Buffalo, at which place the loss and injury to said stallion referred to in said complaint occurred."

It is further alleged in the answer "that such removal was made without the consent or permission of this defendant."

Before the policy was issued an application in writing was made by Williams for insurance upon his dwelling house, household furniture, and on "wagons, carriages, sleighs, harnesses, robes, blankets and farming utensils on said premises, \$500. On live stock in and near said barns against fire, and anywhere in Orleans and Niagara counties against lightning, \$400." Then the application, after the use of the words which we have already given, contained the following: "Registered stock. On horse colt, 1 year, Kite Gothard, \$—. On mare colt, 1 year, Golden Chimes, \$300. On stallion, 4 years, Red Gothard, \$500." The total insurance applied for was \$4,800.

The last three items mentioned evidently fell within the classification found in section 9, article 5 of the constitution. That section

contains the following words: "Fancy stock shall be especially designated, and a valuation placed upon each when insured."

It is to be observed that the last three items mentioned in the application are not specified therein to be in any building, nor stated to be in any particular place. The evidence, however, indicates that the last two items were upon the farm of Williams, in Royalton, in the county of Niagara.

When the policy was issued of \$4,800 it contained the following language: "On the following property as described in Application and Survey No. 6091, to wit: \$1,200 on Dwelling House. \$600 on Household Furniture, Beds and Bedding, Carpets, Sewing Machine, Wearing Apparel and Provisions therein. * * * \$500 on Wagons, Carriages, Sleighs, Harness, Robes, Blankets, Farming Utensils, including Reaper and Mowers, in and near said barns and outbuildings. \$400 on Live Stock in and near said barns against fire, and elsewhere in Orleans and Niagara counties, against lighting." Then came the following words in the policy: "\$300 on mare colt, 1 year old, Golden Chimes. \$500 on stallion, 4 years old, Red Gothard."

It is thus seen that there are no restrictive words in relation to the stallion's location or building in which he was at the time the policy was issued. Nor does the policy contain any words of restriction against temporary or permanent removal of the stallion from the farm or from the county of Niagara. Therefore, the policy was an absolute policy of insurance, in terms, as to the stallion.

Inasmuch as there is no specification in the application or in the policy of any building in which the stallion was at the time of issuing the policy, we see no occasion to apply to it the provisions of section 12 of the constitution. Indeed, there is no defense alleged in the answer, in terms, under any of the conditions mentioned in section 12 of the constitution. Nor does the policy contain any words restrictive of the place where a loss shall transpire.

It may be that there was an oversight in the application, and a failure to express definitely where the property was in the policy, so far as it relates to the stallion, or to prescribe a limit as to where the loss should transpire which the company should be held liable for. Such omission, however, cannot be made the foundation for defeating the positive and unrestricted language of the policy.

The stallion came under the designation of "registered stock," and under the classification of "fancy stock."

We are of the opinion that the defense sought to be made is unavailing.

Somewhat similar questions have been discussed in two reported cases which are adverse to the contention of the defendant. (*Covenentry Mutual Live Stock Ins. Assn. v. Evans*, 102 Penn. St. 281; *Reck v. Ins. Co.*, 163 id. 443.)

By the issuance of the policy in question the defendant was not engaged in transacting business outside of the territory prescribed in its articles of incorporation.

By issuing the policy the company did not "transact business" beyond the territorial limits mentioned in its certificate of incorporation, and, therefore, did not commit an infraction of section 278 of chapter 690 of the Laws of 1892, as amended by chapter 907 of the Laws of 1896. Nor did it issue a policy on "property out of the limits of the territory" where it was authorized to do business by its articles of incorporation, and, therefore, did not, in terms, violate section 12 of chapter 573 of the Laws of 1886, which latter statute related to the formation of town and county co-operative insurance companies.

In the opinion delivered by the learned trial judge many pertinent suggestions are made in respect to the construction of the policy in question. We quote with approbation from that opinion the following: "In the absence of special restriction, clothed in clear and unequivocal language, as to the territory within which the property was to be insured, it will be deemed to have been within the contemplation of the parties that the property might be used in the ordinary way, and, considering the nature of the property, that the insurance would continue to attach wherever the same may be while the owner is using his property in the ordinary manner, and for the purposes for which such property is ordinarily held and used. (Wood on Fire Ins. [2d ed.] § 47; *Noyes v. The Northwestern National Ins. Co.*, 64 Wis. 415; *Longueville v. The Western Assurance Co.*, 51 Iowa, 553; *Mills v. The Farmers' Ins. Co.*, 37 id. 400; *Peterson v. Mississippi, etc., Ins. Co.*, 24 Iowa, 494.)"

If the defendant desires to avoid its obligation of insurance of

property as soon as the property is removed beyond the territorial limits in which it is authorized to transact business, it should insert a clause to that effect in its policy, to the end that the party receiving the policy may have a clear understanding of the restrictions and limitations sought to be imposed upon the owners of property.

The foregoing views lead to the conclusion that the defense attempted was properly overruled at the Trial Term.

Judgment affirmed, with costs.

All concurred, except FOLLETT, J., not sitting.

Judgment affirmed, with costs.

MARY PICKETT, Respondent, v. METROPOLITAN LIFE INSURANCE COMPANY, Appellant.

Life insurance — the beneficiary may introduce in evidence proof of death — a defect of parties, not apparent on the face of the complaint, must be pleaded — application signed by another for an insured person who could not write.

Where a policy of life insurance requires the submission to the insurance company of proofs of death, the beneficiary may, in an action on the policy, introduce them in evidence in order to show compliance with the requirements of the policy.

Where the complaint in an action does not show upon its face a defect of parties plaintiff, the objection of non-joinder or misjoinder is waived unless it is set up in the answer.

Where the agent of a life insurance company is informed that the insured cannot write, and his sister, by his request, signs his name to the application for insurance, the company cannot subsequently resist payment of the policy upon the ground that the application was not in fact signed by the insured.

APPEAL by the defendant, Metropolitan Life Insurance Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Cayuga on the 15th day of May, 1896, upon the verdict of a jury rendered by direction of the court, and also from an order entered in said clerk's office on the 28th day of May, 1896, denying the defendant's motion for a new trial made upon the minutes.

Frank S. Coburn, for the appellant.

P. McLaughlin, for the respondent.

HARDIN, P. J. :

On the 27th day of July, 1891, the defendant executed and delivered to the plaintiff its policy of insurance upon the life of one Edward Fanning, who was a brother of the plaintiff. During the lifetime of Edward Fanning the plaintiff paid to and tendered to the defendant the amounts by the provisions of the policy required to be paid, and the defendant, by its policy, promised to pay to the plaintiff, on the death of said Edward, if such death occurred after the expiration of one year from the issuing of the policy, the sum of \$576. He died on the 26th of March, 1893, having lived more than one year after the issuing of the policy.

The complaint alleges that the policy was issued to the plaintiff, a sister of the said Edward, "and she has ever since remained and now is the owner and holder thereof and is entitled to payment thereon."

The complaint further alleges that proofs of the death of Edward Fanning were delivered to the defendant and that it denied its liability under said policy and neglected and refused to pay to the plaintiff the amount due by the terms thereof.

The answer of the defendant consisted of several denials, but admitted that it issued the policy on the 27th of July, 1891. It also alleged that the application "was not in fact" signed by Edward Fanning. It also alleged that he was not present, and "had no knowledge whatever that such application was being made and knew nothing of the existence of said insurance until long after the policy in question had been issued."

It was also alleged in the answer that the policy of insurance "was procured from defendant by the plaintiff by false and fraudulent means, and by acting in collusion with one or more of defendant's agents in the perpetration of such fraud."

Upon the trial evidence was given tending to support all the essential allegations of the plaintiff's complaint, and also tending to negative the allegations of the defendant's answer so far as the same relates to any affirmative matters.

At the close of the evidence each party asked for the direction of a verdict. Therefore, the questions of fact were for the court to pass upon, and he did so in ordering a verdict for the plaintiff, and as neither party asked to have any question of fact submitted to the

jury, the findings of fact made by the court, as evidenced by the verdict, should be sustained. (*Fogarty v. Hook*, 84 Hun, 165; *Grogan v. U. S. I. Ins. Co.*, 90 id. 521; *Adams v. Roscoe Lumber Company*, 2 App. Div. 47-49.)

(2) The policy required the submission to the defendant of death proofs, and the same were prepared and executed by the plaintiff and delivered to the defendant, and that fact was properly shown upon the trial, and it was proper to produce and offer in evidence such proofs to establish that the plaintiff had complied in that regard with the requirements of the policy.

Helwig v. Mutual Life Ins. Co. (12 N. Y. Supp. 172) does not aid the contention of the defendant. In that case a statement accompanied the proofs of loss, and it was held that the statement could not be used as evidence against the plaintiff in an action on the policy.

(3) It is contended in behalf of the defendant that the plaintiff's interest in the policy was a joint interest with one Rose McCabe.

The complaint alleged that the plaintiff was the owner of the policy and the proofs showed that the policy and receipt book were delivered to her, and that she paid all the premiums. In the policy there was provision made that the production of the policy and the receipt book, "signed by any person furnishing proof satisfactory to the Company that he or she is * * * husband or wife, or relative by blood, lawful beneficiary of the insured, shall be conclusive evidence that such sum has been paid to and received by the person or persons lawfully entitled to the same, and that all claims and demands upon said Company under this Policy have been fully satisfied." The name of Rose McCabe is not mentioned in the policy. The answer did not set up the defense of non-joinder or misjoinder of parties plaintiff. (Code Civ. Proc. §§ 488, 498, 499.)

It has been repeatedly held that a defendant will waive his right to object to defect of parties plaintiff, not apparent upon the face of the complaint, by an omission to state the objection in the answer. (*People v. Metropolitan Telephone & Telegraph Co.*, 31 Hun, 597.) Besides, Rose McCabe was called as a witness at the trial, and testified expressly that she had no interest in the policy and made no claim thereto, and the effect of her evidence is to

acquiesce in the sole ownership by the plaintiff of the policy and the moneys due thereon. (*Grogan v. U. S. I. Ins. Co.*, 90 Hun, 521.)

(4) It appears by the evidence that at the time the application was made for the insurance the plaintiff and her sister were present, and that the agent who solicited the insurance, and who supervised the execution of the application, was made aware that the insured, Edward Fanning, could not write, and, when the application had been filled out and completed, the sister, at his instance and in his presence, was asked to place the name of the insured to the application; and, although it was not written by his own hand, yet it seems to have had his assent, and there is no force in the contention of the defendant, that the application, or the policy, should be avoided by reason of the circumstance that the signature to the application was written by the sister of the insured at his instance and with his consent.

Some exceptions were taken during the trial which have received attention, but require no special comment.

We are of the opinion that the trial judge was warranted in the conclusion which he reached and which is evidenced by the verdict which he ordered.

No counterclaim is set up in the answer, and no specific question was raised at the trial as to the amount the plaintiff was entitled to recover. Practically, the amount recovered, as ordered, was acquiesced in and assented to by the defendant.

We are of the opinion that the verdict and judgment entered thereon should be sustained, and that the order denying a motion for a new trial should also be sustained.

All concurred, except FOLLETT, J., not sitting.

Judgment and order affirmed, with costs.

APPOLINARY KARWOWSKI, Respondent, v. JOHN PITASS, Appellant.

Libel — when vindictive damages are proper — a second and further cross-examination rests in the discretion of the court.

Vindictive damages may be given in an action for libel, where the jury considers that the defendant was incited by actual malice or acted wantonly or carelessly in making the defamatory charge.

The extent to which a further cross-examination of a party, who has already been quite extensively cross-examined, shall be carried, is in the discretion of the court.

APPEAL by the defendant, John Pitass, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Erie on the 23d day of November, 1896, on the verdict of a jury, and also from an order entered in said clerk's office on the 23d day of November, 1896, denying the defendant's motion for a new trial made upon the minutes.

This action was brought on to trial on the 13th day of October, 1896, at a Trial Term held by Mr. Justice LEWIS, and after a trial of five days in length the case was committed to the jury and a verdict of \$3,500 in favor of the plaintiff was returned.

John W. Fisher, for the appellant.

E. G. Mansfield, for the respondent.

HARDIN, P. J. :

Defendant was the owner of a newspaper in the city of Buffalo in which were published the several articles mentioned in the plaintiff's complaint.

At the close of the plaintiff's evidence the defendant moved for a nonsuit, and at the close of the whole evidence the defendant again moved for a nonsuit, and on each occasion took an exception.

The learned trial judge carefully defined libel, and he stated to the jury that the publication of the articles was not denied, and that it was conceded that the various articles that were read to the jury were published by the defendant, and he added: "It is not claimed by the defendant that they were true. That is to say, he

does not plead the truthfulness of them in justification of the articles. But he does plead that these various things that we have listened to here occurred prior to the publication of the articles, and that being annoyed, and thinking that it was for the interests of the people over whom he had jurisdiction to attack the plaintiff, he published these articles. That the articles are libelous—that is to say, that they tend to disgrace and degrade and lessen the esteem of the plaintiff among the people with whom he is acquainted, you will, perhaps, not have any very serious difficulty on that question. There is some dispute as to the correct translation of these articles, and I have had the reporter give me the testimony of the witnesses in translating the articles.”

The judge then proceeded to read the translation made in behalf of the plaintiff and the translation made in behalf of the defendant, and he then instructed the jury, viz.: “One question is, whether this article is of such a character that it tends to disgrace, to degrade and to bring the plaintiff into disrepute among those who knew him. If so, it is libelous.”

He then adverted to the fact that there were other articles that had been read, and added: “You will probably not have any very serious difficulty in coming to the conclusion that these articles, under the definition of libel, as I have given it to you, were libelous.”

He then submitted the other questions of fact to the jury in a cool, careful, deliberate charge. Reviewing it in the light of the recent enunciation of the Court of Appeals in *Smith v. Matthews* (152 N. Y. 157), we think the trial judge committed no error in the body of the charge, or in the refusals to the requests that were made, or qualifications given in answer thereto.

He seems to have been very patient and indulgent during the progress of a long and tedious trial.

We have looked at the several exceptions to which our attention was invited by the learned counsel for the appellant, and are of the opinion that they do not present prejudicial error.

After the plaintiff had been examined as a witness, he was cross-examined quite extensively by the defendant. Apparently, several days thereafter, the defendant proposed to recall the plaintiff for further cross-examination, and indicated to the judge the several

subjects upon which he sought to further cross-examine him. We think the trial judge did not abuse his discretion in declining, at that stage, to allow a more extended cross-examination upon the subjects indicated by the counsel for the defendant.

Without discussing all the legal questions which are raised by the appellant, we think the trial was carefully conducted, and that no such error occurred as requires us to interfere with the verdict of the jury.

It is suggested, in behalf of the defendant, that the damages are excessive. "A libel, recklessly or carelessly published, as well as one induced by personal ill-will, will support an award of punitive damages." (*Warner v. P. P. Co.*, 132 N. Y. 185; *Holmes v. Jones*, 147 id. 59.)

In the case of *Holmes v. Jones* (147 N. Y. 59) it was said, viz.: "The amount of damages in an action for libel is peculiarly within the province of the jury. The jury may give nominal damages or damages to a greater or less amount, as they shall determine. The jury may accord damages which are merely compensatory, or damages beyond mere compensation, called punitive, or vindictive damages, by way of example or punishment, when, in their judgment, the defendant was incited by actual malice, or acted wantonly or recklessly in making the defamatory charge."

Upon a review of the whole case we are of the opinion that we ought not to disturb the verdict. (*Warner v. Press Publishing Company*, 132 N. Y. 181.)

Judgment and order affirmed, with costs.

All concurred, except FOLLETT, J., not sitting.

Judgment and order affirmed, with costs.

ELLEN O'NEILL, Appellant, v. JOHN BARRY, as Executor, etc., of
PATRICK TIGHE, Deceased, Respondent.

Claims against the estates of decedents should be closely scrutinized.

The evidence in support of a claim made against the estate of a decedent should be closely scrutinized.

A claim based upon an alleged loan claimed to have been made by a sister to her deceased brother, rejected, where there was no written evidence to sustain the claim, and there was proof tending to show that the loan was, in fact, an advance made by her to her father, in conjunction with a similar advance made to him by her brother, in order to enable the father to procure the satisfaction of a mortgage which he had given.

APPEAL by the plaintiff, Ellen O'Neill, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Onondaga on the 14th day of January, 1897, upon the report of a referee who was appointed to hear and determine the claim of the plaintiff, referred under the statute, with the assent of the surrogate of Onondaga county.

M. E. Driscoll, for the appellant.

Leroy B. Williams, for the respondent.

HARDIN, P. J. :

Plaintiff was a sister of Patrick Tighe. He died in Onondaga county, and his will was duly probated and letters testamentary were issued to the defendant, and after the defendant had advertised for claims against Patrick's estate the plaintiff presented a claim for \$600. The executor rejected the claim and entered into a stipulation, pursuant to section 2718 of the Code of Civil Procedure, referring the claim to the referee named to hear and determine.

Prior to July, 1892, Michael Tighe, father of the plaintiff and of the testator, executed a real estate mortgage upon property in the Province of Ontario, and in July there remained in arrears upon that mortgage something like \$1,000 of principal and \$212 interest.

Plaintiff met the deceased at her father's house in Canada in July, 1892, and she had with her, at that time, \$600 in currency,

and it was arranged that her brother and she should visit McNab and pay off the balance remaining due upon the mortgage held by him against their father, and accordingly they went to McNab and delivered to him the money necessary to obtain a discharge of the mortgage against the father, and the discharge was executed by McNab upon receiving the balance due upon his mortgage.

The vital question involved in the case was whether there was a loan by the plaintiff to her brother Patrick on the occasion of the adjustment with McNab. In behalf of the plaintiff evidence is given tending to show that she loaned the \$600 to Patrick; whereas, there is some evidence tending to show that, instead of its being a loan to Patrick, she joined with Patrick, her brother, in contributing the money for the benefit of the father to raise the mortgage from the father's estate. There is a very severe conflict in the evidence. The plaintiff produced several witnesses who testified to the admissions of Patrick, which, if believed to the full extent of the language used by the witnesses, would induce the belief that there was a loan instead of an advance in aid of her father in retiring the mortgage from his premises.

The referee saw the witnesses and heard their testimony and had before him all the circumstances relating to the question of fact, and presumably was in a better situation than we are to determine whether the witnesses who testified to the alleged admissions of the deceased were reliable or not. (*McCabe v. Greene*, 45 N. Y. Supp. 724.) He has, upon all the facts disclosed at the hearing, and upon all the testimony delivered, determined the vital question of fact adverse to the plaintiff. His findings are, viz.: "That said sum of money was delivered to the testator to be used, and was used, in paying off a mortgage on the farm of Michael Tighe, the father of both plaintiff and testator. That the said sum was not delivered by claimant to or received by said deceased as a loan or advance, but to be used on behalf of the claimant in paying off said mortgage."

In quite an extensive opinion delivered by the referee he states properly the rules of law applicable to admissions, and in considering the evidence of such admissions he applies the principle laid down in the following cases: *Law v. Merrills* (6 Wend. 268); *Van Slooten v. Wheeler* (140 N. Y. 624).

Although, upon reading the testimony found in the appeal book, we might have some hesitation in reaching the same conclusion that has been stated by the referee, yet we are not at liberty to apply such impressions as we derive upon perusal of the evidence without giving due weight and consideration to the circumstance that the referee saw the witnesses, heard their story, was enabled to judge of the truthfulness of their statements in a more satisfactory manner than we can be upon a perusal of their evidence, and we must, to some extent, be influenced by the conclusion of the referee, and we, therefore, are of the opinion that under the circumstances we are not at liberty to disturb the conclusion reached by him upon the questions of fact. (*Titus v. Perry*, 13 N. Y. St. Repr. 237.)

In *Roosa v. Smith* (17 Hun, 138) the rule was laid down which has been found quite satisfactory in respect to the report of a referee upon conflicting evidence in a case somewhat similar to the one now under consideration. Applying the rule there laid down we ought not to disturb the referee's report. That rule has been followed in *Teeter v. Teeter* (47 N. Y. St. Repr. 580); *Stanley v. National Union Bank* (41 Hun, 640; S. C. affd., 115 N. Y. 122); *Sackett v. Thomas* (38 N. Y. Supp. 608; 4 App. Div. 448).

It was the duty of the referee to scrutinize closely the witnesses who sought to establish a claim against an estate, especially as this claim was not supported by any written evidence, and especially as it was somewhat exceptional and unreasonable that the deceased should borrow \$600 from his sister without giving any written evidence or voucher therefor:

It was the duty of the referee to require satisfactory evidence of the existence of the claim before allowing the same against the estate. (*Kearney v. McKoon*, 85 N. Y. 139; *Rowland v. Howard*, 75 Hun, 1; *Matter of Van Slooten*, 140 N. Y. 624.) In the latter case it was said: "The courts should see to it that such estates are fairly protected against unfounded and rapacious raids." The doctrine of that case was followed by this court in *Yates v. Root* (4 App. Div. 439).

We have looked at the exceptions taken during the progress of the trial with some care, and we do not find that any of them present any error which warrants us in interfering with the report of the referee.

The learned referee has stated his views of the case in an opinion, and quoted authorities in support of his views of the evidence, and we find no occasion to differ from him in respect to the rules of law or the evidence which he adverts to in such opinion.

All concurred, except FOLLETT, J., not sitting.

Judgment affirmed, with costs.

KATE DWYER, as Administratrix, etc., of MICHAEL DWYER, Deceased,
Respondent, v. BUFFALO GENERAL ELECTRIC COMPANY, Appellant.

Negligence — a lineman of a telegraph company killed by touching an iron brace upon his own pole, in contact with the bare wire of an electric lighting company — proof that a "flash" was caused by touching the iron brace with a wire.

A lineman of a telegraph company, not wearing gloves, after ascending one of its poles, which carried wires having an electric current of about 160 volts, and upon grasping an iron brace supporting a crossarm upon his own pole, in regard to which there was evidence from which it might be inferred that it came in contact with the wire of an electric light company carrying a deadly current of about 1,100 volts from which the insulation had been abraded by contact with the brace, neither the fact of contact nor the defect in insulation being determinable from the ground, instantly threw up his arms and fell backwards and was picked up dead. Across the palm of one of his hands there was a mark about an inch wide which looked like rust, and the autopsy indicated that the deceased had received a more or less severe shock of electricity.

In an action brought by the administratrix of the deceased against the electric light company to recover the damages resulting from his death,

Held, that the court was justified in submitting to the jury the questions as to the defendant's negligence and the contributory negligence of the plaintiff's intestate;

That a witness might testify that a flash of light was occasioned by the touching of a wire to the iron brace attached to the telegraph pole — such testimony is the statement of a fact, not the expression of an opinion.

APPEAL by the defendant, Buffalo General Electric Company, from an order of the Supreme Court, made at the Erie Trial Term and entered in the office of the clerk of the county of Erie on the 2d day of April, 1897, denying its motion for a new trial made upon the minutes after the jury had rendered a verdict in favor of the plaintiff upon a trial at the Erie Trial Term.

Tracy C. Becker, for the appellant.

Ansley Wilcox, for the respondent.

HARDIN, P. J. :

On the 23d of August, 1895, Michael Dwyer, the husband of the plaintiff, in William street in the city of Buffalo, lost his life, and the plaintiff brings this action to recover damages.

A trial was had at the March Trial Term in Erie county before the court and a jury, and a verdict of \$6,000 was rendered in favor of the plaintiff.

It is alleged in the complaint that prior to that time the defendant had constructed one of its lines for the transmission of electricity along the northerly side of William street in the city of Buffalo, and that at the northwesterly corner of William street and the tracks of the New York Central and Hudson River Railroad Company, where the same cross William street, defendant had erected a pole to carry its said electric light wires, "and had negligently and improperly placed the said pole near to a certain other pole containing a large number of telegraph and telephone wires of the Western Union Telegraph Company and the Bell Telephone Company of Buffalo, which said last-mentioned pole and wires were lawfully placed in their position ; and the defendant had negligently and improperly strung its electric light wires upon its said line of poles, and had negligently failed to keep and maintain the same in proper condition so that the said electric light wires were immediately under the said telegraph and telephone wires, and one of the said electric light wires came in contact with a certain iron brace on the pole supporting the said telegraph and telephone wires and forming a part of the structure designed to hold up the said wires, and that by reason of the said electric light wire coming in contact with the said iron brace and of rubbing against the same, the protecting and insulating material was rubbed off from the said electric light wire so that the said iron brace became heavily charged with electricity, all of which was due to the faulty and negligent construction and maintenance of the said pole and line of the defendant company."

The deceased was in the employ of the Western Union Telegraph Company as a lineman, and it became his duty to "lay out,

construct and repair lines of telegraph wires on the poles of the said Western Union Telegraph Company ;” and it is averred that on that day he was directed by his employer to repair certain telegraph wire on the said William street line of said company. It is further averred that “for the purpose of repairing said wire he was obliged to and did climb the pole of the Western Union Telegraph Company located at the northwesterly corner of William street * * * standing near the pole of the defendant * * * that while the said Michael Dwyer was climbing the said pole lawfully and in the performance of his duty, and in the exercise of due care and caution, he grasped or came in contact with the said iron brace upon said pole, which was in contact with the electric light wire of the defendant * * * and was heavily charged with electricity therefrom, without any knowledge or notice or means of ascertaining that said brace was in such a condition or that the said brace was in anyway dangerous, and by reason of touching the said brace he received a shock of electricity which caused him, without any fault or negligence on his part, to fall from his position to the ground, and that he was then and there killed and died.”

The answer of the defendant admits its incorporation, and “that the defendant is engaged in the transmission of electricity for sale and for general lighting ; and for other purposes in and throughout the city of Buffalo * * * which electricity is transmitted through metallic wires suspended upon poles which are generally placed upon and along the streets of said city ; that the said wires are covered with a protecting or insulating material ;” and that the defendant “had erected a pole to carry its said electric light wires.”

The answer contained denials of certain allegations in the complaint, and alleged “that the injuries to the plaintiff’s intestate, as set forth in the complaint, were caused wholly through the fault or negligence of plaintiff’s intestate, or some person or persons to this defendant unknown.”

From the evidence it appears that the deceased was sent out on the morning of August twenty-third to remedy some trouble that had been reported on the line of a telegraph wire of the Western Union, running along William street and crossing the railroad tracks. At about ten o’clock in the morning he climbed, by means of iron spurs fastened on the inside of his ankles, the telegraph pole

belonging to the Western Union Company while in the performance of his duty. After reaching a point at the upper end of the pole where he could reach the last crossarm on the telegraph pole, which was some twenty-eight feet from the ground, he reached up with his left hand, apparently with a view to grasp the crossarm or the iron brace under it. He then suddenly threw up both hands and fell over backwards in a circle, his feet clinging to the telegraph pole by the spurs until he had about completed his revolution, when he fell head foremost to the stone pavement at the foot of the telegraph pole, and near to it, dead.

Several witnesses were produced by the plaintiff who described the circumstances attending the deceased's climbing the pole and the manner in which he fell. The witnesses are in substantial accord in the narration of the observations made by them of the deceased from the time he commenced to ascend the pole until he descended.

Upon the other hand, the defendant called as a witness one Donovan, who describes the observations that he made attending the deceased's movements up the pole and down again, in many respects in conflict with the evidence produced by the plaintiff.

The evidence offered by the plaintiff tended to establish the fact that when the deceased had climbed up the pole he put out his hand and reached the iron brace which supported the lowest crossarm of the Western Union pole, and that instantly, upon his hand coming in contact with the brace, he received a sudden shock of electricity which caused him to throw up his arms and to let go of the pole and to fall to the ground.

Upon all the evidence detailed in respect to the circumstances of his fall, it may be said there is room for some doubt whether he was instantly killed by the shock of electricity, or whether that caused him to let go the grasp of the brace fastenings and to fall to the ground, and that his death ensued from the injuries which he received—the breaking of his backbone and the injuries to his skull; and it may be said that a fair question of fact was presented to the jury to determine whether the proximate cause of his death was the shock of electricity which he received, or the injuries which he sustained by reason of the fall.

The evidence tends to show that, supporting the Western Union wires was a V shaped brace placed there to strengthen the cross-

arm. It consisted of two iron bars bolted together at the bottom by a single bolt and fastened into the telegraph pole some eighteen inches below the crossarm and extending from the pole out to the crossarm at an angle of about forty-five degrees.

The evidence indicates that the telegraph pole was erected and the crossarms placed thereon, and the wires of that company placed there in March, 1894, and that subsequently the defendant, under a grant of authority from the common council of the city of Buffalo and in accordance with law, placed its line of poles, wires and lights along William street, being lawfully in the street under a grant from the common council.

It appears that there were before the jury two braces and two bolts similar to those on the Western Union pole, and there was evidence tending to indicate that one of defendant's electric light wires was in contact with the iron brace, and that the wire, by constant friction caused by rubbing against the iron brace, had lost its insulating cover to such an extent that the copper wire came in direct contact with the iron brace.

There was some evidence tending to indicate that the wire of the defendant touched two of the braces, and to the effect that the one where the abrasion of the insulation was the greatest was the westernly one.

The evidence tends to indicate that the electric light wire was charged with electricity, carrying at that time about 1,100 volts, which, according to the witnesses, is sufficient to give a deadly shock and cause instant death to any one receiving the full force thereof.

In addition to the circumstances disclosed by the witnesses who saw the accident, the plaintiff produced at the trial four photographs of the pole in question and its immediate surroundings, and gave evidence in connection therewith as to the manner in which they were taken and as to the circumstances disclosed in the presence of the witnesses that were engaged in taking the photographs and observing the situation at the time they were taken. The photographs were taken, however, on the twenty-ninth of August, six days after the accident.

The witness Devlin, who superintended the taking of the photographs, testified that he had climbed the pole about an hour after the accident, and that there had been no change in the situation or

condition of the pole or the wires in the interval of the six days. No evidence was produced tending to show there had been any change in the conditions during the period intervening between the death and the taking of the photographs.

Apparently the electric light pole stood only about three feet distant from the telegraph pole at the bottom, and the distance between the two was not over five feet in the region of the wires. At the time the photographs were taken, according to the testimony of Hanks, he climbed a pole carrying with him a piece of insulated wire, one end of which had been stripped down to the metal and attached to the iron trolley pole so as to form a metallic circuit for electricity to the ground; that he put the exposed end of the wire which he held in his hand near to the iron brace, and when the contact was made with the iron brace it produced a flash of light occasioned by a discharge of electricity from the brace into the wire, and through the wire into the trolley pole and into the ground. According to the facts narrated, in addition to those already mentioned, it is insisted in behalf of the plaintiff that it was established that the brace was heavily charged with electricity occasioned by the contact of the electric wire with it.

During the trial it appeared that the Western Union wires contained only about 160 volts on an average, and, according to the testimony given by some of the witnesses, that sometimes went as high as 250, and that the linemen were accustomed to handle the wires of the Western Union Company without gloves, and without receiving any injury or shock, even if they grasped the wires with the naked hand.

It was sought by the plaintiff to establish that it was the electricity from defendant's wire which charged the brace, and that the electricity found in the brace could only be accounted for by supposing that the wire of the defendant communicated the same to it. Bearing upon that question evidence was given to show that telegraph wires were at a very low amperage and that the electric light wires were at a high amperage. Evidence was given tending to show that voltage relates to the strength and that amperage is the amount of the electric fluid.

The plaintiff called as a witness McNierney, a foreman of the

Western Union Telegraph Company, who had charge of the workmen in 1894, and who was acquainted with the pole where the injury was received, and he testified that he had knowledge when the electric light company's pole on the northwest corner of William street was placed there, and he added: "I know that I sent a man to see that they cleared; there was trouble about the electric light men setting their poles; they set them too close and I had to send to have them clear them." This witness says the defendant's poles were set in August, and he adds: "I had some talk with Mr. McGuire, the general foreman, and Dillon, the superintendent and general foreman of the electric light company, about the poles on William street; this pole was not so bad as others. I didn't specially mention it. I had a talk with them about the series of poles on William street, near the Central Belt line, of which this pole was one. * * * After the new electric light poles were set they were up close to my crossarms, but not so close they would interfere with my wires, with the exception of one place they raised up my wire on to the crossarm, and that is the first pole east of this pole in question. * * * I had a talk with Mr. Dillon, the general foreman, about this wire, and others. If this electric light wire was only about six inches below the bottom crossarm, it would be about eleven inches from the Western Union wires, which were above the crossarm. The crossarm being four inches wide and the pin above being six inches, the wire would be five to six inches above the top of the crossarm; the crossarm would be about four inches, that would make nine or ten inches, and the electric light wire was six inches below that, so it would make the electric light wire something like eleven inches from the nearest Western Union wire. If one of the Western Union wires sagged or broke and came in contact with the electric light wires it would burn out our safety wires and probably our instrument. The electric light wires and our wires run along William street parallel, the electric light wires were right under our wires and run from pole to pole. * * * The electric light wires are insulated. * * * If that insulating material is ripped off the electric light wire and it comes in contact with another piece of metal, that metal becomes charged with electricity if there is any connection with the ground, or with any metal substance going to the ground. In this case if the elec-

tric light wire which was strung on this electric light pole to the next pole east, rubbed against the iron brace on the Western Union pole, and the insulating material on the electric light wire was rubbed off, that iron brace would become charged with electricity, and if any person caught hold of that iron brace with his bare hand and he also in any way made a circuit to the ground, either through another wire that he had in his hand, or in any way, he would receive a heavy shock of electricity in this case. The effect of that shock would be, well, holding that brace, my experience is it would throw him, make him lose his hold, give him a shock. If this iron brace that supported the lower crossarm was not charged with electricity it was a perfectly safe thing to catch hold of. Unless it got charged with electricity from some outside source away from our pole there was no danger in catching hold of that brace. The brace was strong. That was a proper thing to catch hold of up there; it is customary to catch hold of that. It is a proper thing for a man up there, examining a wire to see if it is properly insulated, to catch hold of that brace in doing so. I have done that myself. If the brace is charged with electricity from an electric light wire it is not a safe thing to do."

Numerous witnesses testified that a party could not discover, by looking up from the street, whether the electric light wire was in actual contact with the iron brace on the telegraph company's pole, although it could be seen that it was close to the brace. Nor could any one determine that the insulating material had been rubbed off while standing upon the ground.

The witness Devlin, who examined the pole, brace and wires an hour or two after the accident, testified: "I found it touched the Western Union brace on the street side under the last crossarm; the electric light wire on the pin next to the pole on the street side. There were three electric light wires on that pole, two on one side and one on the other. * * * I did not test the brace at that time or touch it. I should judge that where the brace and wire came in contact would be about five or eight inches below the bottom of the Western Union crossarm. I could not tell until I got up on the pole whether the insulating material that surrounded the electric light wire was rubbed off. When I got close I could see that the insulation was worn off of the electric light wire; it looked like

the wire itself was directly in contact with the brace. * * * I looked at the wire and brace in question from the ground ; I couldn't see any change from the 23d of August to the time on the 29th when I went to take the picture. I looked to see and there didn't look to be any to me." This witness also testified that he saw the flash when the picture was taken, and he added : "I know what made that flash." When the question was propounded to him, "What made that flash?" it was objected to on the ground that the question called for an opinion and that the witness has not been shown to be competent. The objection was overruled and the defendant took an exception. The witness then added : "The contact of that wire with the brace made the flash." The witness was then asked, "You were asked to explain what made the flash?" and the objection was renewed and an exception taken, and the witness answered : "Touching the wire to the brace made the flash. Q. What did that indicate in regard to the condition of the brace?" The witness answered : "To the best of my recollection that flash was made three or four times."

We think the question called for an observed fact, and that when the witness described the circumstances under which the contact was made, by means of the wire with the brace, and that as soon as the contact took place that a flash appeared, he stated a fact which we think was competent and the exception to his evidence does not present error.

In *Manke v. People* (17 Hun, 417 ; S. C. affd., 78 N. Y. 611) TALCOTT, P. J., said : "The question discussed lies very near the line which divides cases in which opinions are competent to be given in evidence from those which are clearly inadmissible." And he reached the conclusion that the opinion of the witness, formed by a process of reasoning upon the facts known to him, was incompetent, as he was asked whether a piece of alleged wadding fired from a gun had the appearance of wadding fired from a gun and was allowed to express his opinion. We think the case differs from the one in hand.

The case of *Ferguson v. Hubbell* (97 N. Y. 507) differs from the case here, as there it was held that it was not proper to allow a witness to answer as to when was the proper time to burn a fallow.

It is insisted in behalf of the defendant that the evidence to which we have adverted proves nothing whatever against the defendant, and it is suggested that the intestate lost his balance and fell to the ground, or that in some other way he fell, and that the evidence does not sufficiently indicate that he received any current of electricity sufficient to cause a shock from any wires except his own wires.

The plaintiff called as a witness one Hurlburt, who saw the accident and helped pick up the deceased and carry him into the flag shanty, and the witness stated: "He fell off on the east side; right off backwards; * * * his head went back and his spurs held his feet; his head was towards the west as he fell back. He didn't breathe after I got there. He struck right on the sidewalk, right near the curbstone, right at the foot of the pole on the side nearest the tracks, just east of the pole on the sidewalk; he had his coil of wire on his right shoulder. * * * I remember some braces on that telegraph pole under the crossarm. He was near the crossarm, so that if he had put his hand out he could have reached the brace. I think he was within reaching distance of the brace." The witness then added that he looked at his hands after he fell, "and on the left hand there was a little rust; it might have been an inch wide, just marked across the palm of his hand, a mark of rust."

The deceased was taken to the morgue, and the next day an autopsy was held in the presence of the coroner and physicians, and one of the physicians testifies that conditions and circumstances were found which tended to indicate that the deceased received a shock of electricity. In speaking of the hand one of the physicians observed: "It looked as if the hand had come in contact with a wire or brace, and that it had produced a slight hyperaemic condition of the skin on the joint. * * * There was something in the man's condition as I examined it which indicated to me that he had received a more or less severe shock of electricity." This witness gave other facts and circumstances tending to fortify the opinion expressed by him, and he was thoroughly cross-examined, and, to some extent, his utterances were shaken.

Upon this subject the defendant called two other physicians, who gave evidence tending to contradict the testimony offered by the

plaintiff relating to the appearance and indications of the deceased, and tending to show that he was not a victim of an electric shock.

After a careful examination of the evidence supporting the theory of the plaintiff, and the evidence of the defendant tending to contradict and to explain, and to overcome the evidence of the plaintiff, we are of the opinion that a question of fact was presented to the jury for determination, as to whether the deceased received an electric shock which caused him to fall or which caused his death. We think the questions presented by the evidence in regard to the circumstances of his injuries required the submission of the question of fact in that regard to the jury, and that we ought not to disturb the verdict of the jury so far as it relates to that branch of the case.

We think *Strohm v. N. Y., L. E. & W. R. R. Co.* (96 N. Y. 305), to which we are referred by the learned counsel for the appellant differs from the case in hand. In that case a speculative opinion was held not to be admissible which related to consequences which were contingent, speculative, or merely possible as to the future.

The evidence to which we have adverted in the case here related to the conditions of the body of the deceased as seen, inspected and disclosed to the physicians making the post mortem examination, and, upon the conflict found in that evidence, we think a question was fairly presented for the consideration of the jury.

Whether the deceased took hold of the brace with his right hand or not may be said to have been a question of some doubt, upon the evidence which was offered at the trial, as it was also a question of fact to determine whether the injuries which he received resulted from clutching the wires of his own company having a voltage of only 160, or whether he received the greater shock from the brace which was in contact with the wire carrying a voltage of 1,100. We think the plaintiff's evidence, as well as the evidence offered by the defense, left those questions in such a condition that it was the duty of the court to submit the same to the jury, and that the trial judge committed no error in refusing to direct a verdict as requested by the defendant.

It is strenuously argued by the learned counsel for the appellant that the deceased could not possibly have fallen from the pole in

question because of any shock which he received from defendant's wire, and, in fact, did not receive any such shock, but fell accidentally and while carelessly leaning back too far to carry over the testing wire from the trolley pole to his wire, or by a shock from his own wire, or from the street railway wires on the trolley pole. We are not able to assent to the argument of the learned counsel in that regard, and cannot, therefore, interfere with the verdict upon any conclusions we may form in regard to such aspects of the case. We think the questions properly belonged to the jury.

It is appropriate at this point to recall the fact that the defendant was compelled to concede "that the wire of the defendant's lighting system, which was used for carrying a death-dealing current, was against the brace on the Western Union pole, and that the plaintiff's intestate was in a position where he might have touched the brace," and that the insulation had been worn off; and the facts being before the court upon such questions, we think the court committed no error in taking the verdict of the jury in respect thereto, and that the evidence presented a legitimate question for the jury to determine whether the plaintiff's intestate received a shock from the defendant's wire which caused his death.

In *Clarke v. Nassau Electric R. R. Co.* (9 App. Div. 54) it was said: "The fact that the defendant brought electricity into the street for use as a motive power, and the fact that electricity so employed was capable of escaping in such a way as to produce the casualty which actually took place, were sufficient, taken together, to justify the inference that the accident was due to the agency of the defendant, in the absence of proof that it was otherwise caused. The maxim *res ipsa loquitur* is directly applicable."

In *Ennis v. Gray* (87 Hun, 361) it was said: "So here we might ask whether the happening of this accident does not carry with it an imputation of negligence, it being self-evident that if the wires had been properly insulated it would not have occurred, and it being equally clear that, with the exercise of ordinary care, defective insulation could be avoided. * * * The plaintiff assumed the burden of establishing the negligence of the defendant, and in that connection presented evidence from which the jury properly could infer that the position and manner of construction of the wiring and electrical converter were improper, and that in five places the

wire was imperfectly insulated, and bore evidence of having been in that condition for some time." (*Evans v. Keystone Gas Co.*, 148 N. Y. 113.)

Here we have the positive evidence that the wire of the defendant was carrying a large voltage, and the insulation had been worn off where the wire came in contact with the brace of the Western Union Telegraph Company, and we have the fact that the deceased was legitimately in the pursuit of his employment upon the pole of the Western Union, and that while upon the ground the fact was not discoverable by ordinary care and observation that the defendant's wire was in contact with the brace, and that the insulation had been rubbed off to such an extent as to enable the wire to charge the brace, and we think it was legitimately a question of fact for the jury to determine, upon the whole volume of evidence that was delivered, whether the deceased received a shock from the brace which had become heavily charged with electricity from the wire of the defendant. We think the evidence was sufficient to warrant the jury in finding that the defendant was negligent in having so left its wire that it might come in contact and lose its insulation and charge the brace. And it was also a question whether the defendant had been negligent in inspecting its wire and properly guarding against its contact with the property of the Western Union. And we think the case fails within the principle laid down in *Clarke v. Nassau Electric R. R. Co.* (*supra*), where it was held "that the evidence amply warranted the inference that the horse was killed by an electric shock received from some source, and that as defendant had brought electricity into the street for use as a motive power, and as electricity so employed was capable of escaping in such a way as to produce the casualty which actually took place, these facts were sufficient to justify the inference that the accident was due to the agency of the defendant in the absence of proof that it was otherwise caused."

In the case at hand it was for the jury to determine whether the accident was caused by other circumstances, such as were disclosed in the large volume of evidence offered by the defendant tending to account for the accident, without its fault or negligence.

After perusing that evidence we are not able to say that the jury has gone wrong, or that the trial judge committed any error in

leaving the whole question of defendant's alleged negligence to the jury. Nor do we think the learned trial judge committed any error in submitting to the jury the question as to whether the plaintiff was guilty of contributory negligence. Although it was conceded that the deceased did not wear any gloves, the evidence tended to indicate that none were in use by the employees of the Western Union Telegraph Company, nor was there necessity for their use in the ordinary business in which the deceased was engaged.

Doubtless the deceased supposed that the wires of the defendant had been properly insulated, and in making use of the brace for his aid or protection when holding himself upon the pole with spurs he only pursued the ordinary course pursued by persons of ordinary care and prudence when engaged in such employment. At least the evidence warranted the jury in so finding, and, therefore, we ought not to disturb their verdict in that regard.

Although Aldrich, foreman of the Bell Telephone Company, testified that the company had rules requiring employees to wear gloves working on poles around trolley and electric light wires, and that their men "are supposed to have gloves with them," it was, nevertheless, a question of fact for the jury to determine whether the deceased exercised ordinary care under the circumstances disclosed by the evidence as to his employment as a lineman in the discharge of his duties relating to the Western Union wires. (*Gilman v. Boston & M. R. R. Co.*, 47 N. E. Rep. 193.)

The learned trial judge delivered a full and exhaustive charge to the jury, in the course of which he said: "The measure of the defendant's duty, with reference to the erection of this pole and of these lines, was reasonable care and prudence under the circumstances which surrounded the operation. That was the measure of its duty, and if it used that degree of care and prudence which a man, an intelligent man, would ordinarily use in his private business, under the same circumstances, then the duty, so far as the constructing of the poles and line is concerned, was performed." He then proceeded to say: "Assuming that the pole and wire were carefully and prudently erected at this point, then the duty devolved upon this defendant of afterwards maintaining a reasonable oversight, supervision and inspection, to see that the wire and the pole

was kept in a safe and suitable condition, therefore, the claim of the plaintiff is that they failed, entirely failed, according to the evidence in the case, to maintain such oversight and supervision after the pole was erected, and that in consequence of that failure, on the part of the defendant, that the insulation of the wire was worn, and the wire itself came in contact with the brace, and created a condition of things which resulted in this man's death."

He then proceeded to submit carefully the question whether the deceased was guilty of contributory negligence to the jury, and in response to a request that he charge the jury "that there is no evidence sufficient to warrant the jury in finding that when Dwyer received his fall there was any apparent trouble or defect in the defendant's system of wires other than the alleged defect of the wire in contact with the brace on the pole in question," he observed: "There is no direct evidence of it. I do not know there is any." The counsel for the plaintiff then said: "I admit there is no direct evidence, but I think there is inferential evidence." We think the court was not called upon to go any further in its charge, or to restate its response to the requests as made.

Upon the whole case we are of the opinion that the evidence warranted the jury in finding that the defendant was guilty of negligence and that the plaintiff was free from contributory negligence, and that the negligence of the defendant was the proximate cause of the death of the intestate, and that the learned trial judge committed no error in refusing the motion for a new trial on the minutes, and we, therefore, affirm the order.

All concur, except FOLLETT, J., not sitting.

Order affirmed, with costs.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. JOHN M.
FITZGERALD, Appellant.

Arson — a priest, by his servants, burning a parochial school building to get the insurance — evidence as to his relations with his servants — his insolvency — a telegram sent to a servant on the day before the fire — the accused should account for his whereabouts — res gestæ of the flight of an accomplice — acts of insurance agents applied to for insurance — admissions of accused that he could not get property insured in his own name — demand after a loss that moneys be paid to the trustees of his church and not to the bishop — letter of his bishop charging the priest with “public drunkenness” — motive for arson — charge as to the failure of the accused to testify.

Where a prosecution for the crime of arson is conducted upon the theory that the defendant, the pastor and treasurer of a church at Charlotte, near Rochester, and a member of its board of trustees (consisting, besides himself, of two lay members, the vicar-general and the bishop of the diocese), who had been threatened by the bishop with immediate removal from his charge, procured a parochial school building, where a school was conducted by three sisters, under his supervision, to be burned by his two servants, John Cronin and Nora Cronin, in order to get the insurance money and thereby secure the payment of a balance of salary due him as pastor and pay his debts, proof is admissible that his relations with the servants in question were confidential; that he had caused real estate to be conveyed to them without receiving any consideration therefor, and in some cases without their knowledge; that he was insolvent in the month when the fire took place, and that executions were then outstanding against him, and that his relations with the sisters at the school had become somewhat strained and disturbed.

After the People have proved that the defendant, having arranged for an entertainment to be given in the school building upon the night of the fire, left his home for Troy on the morning of the day before the fire occurred, they may show that he, only a few hours later, prepared upon the train, and sent from Syracuse to Nora Cronin, a telegram in the following words: “Tell Mr. Ellis I was called away suddenly; return if possible to-night. Have Johnnie close all doors and lights out after entertainment; many tramps now in Charlotte; use your own best judgment.”

Seemly, that where, in such a case, it is in the power of an accused person to account for his whereabouts, the fact that he fails to do so is strong presumptive evidence against him.

In such a case the People may properly give the following evidence:

Where proof has been made that watchers of the parochial school building upon the night of the fire saw John Cronin come out of the defendant's residence and go in the direction of the school building, and thereafter saw a blaze in it, and a man rush out of the building, who, being pursued, ran into the defendant's

house, where Nora Cronin was found standing in the dining-room door with a lamp in her hand, which, upon the appearance of the officer, she blew out, thus enabling the man to escape temporarily (notwithstanding which act the officer was enabled to identify the man as John Cronin), the People may show, as a part of the *res geste* of the flight of John Cronin, that Nora Cronin was dressed in ordinary clothes, and that her hair was done up in the same manner as if she had been at work, although the fire occurred about two o'clock in the morning.

An examination of John Cronin as to his whereabouts on the night of the fire is admissible.

The bookkeeper of an insurance agent may testify that he hesitated, in the absence of his principal, to issue, within a week of the fire, the additional policies which the defendant requested upon the parochial building, for the reason that he knew that the company would not carry any insurance in the name of the defendant, but that he thought that perhaps the agent would write the policies in another shape.

The agent himself may testify that two days before the fire occurred he notified the defendant that his company would cancel the policies which it had issued, and that it would not insure any property in Charlotte, "especially on Father Fitzgerald's (defendant's) property;" and a mortgagee of the property of the defendant may testify to a statement of the defendant, in substance, that he could not get his property insured in his own name, and that he would have it transferred to some one else in order to effect the insurance, mentioning in this connection Nora Cronin.

The People may also show that the defendant, in demanding payment to himself of the insurance moneys, stated, in effect, that the trustees of the church would do anything he told them to do; that the money must be paid to the trustees; that if the company settled with the bishop or any one else he would hold it responsible, and that he was willing to sacrifice a little on the policies if a prompt settlement were made; and may further show by the lay trustees of the church that the latter had no part in obtaining the insurance in question, and that it was procured solely by the defendant; and by the bishop, in charge of the diocese, having the power to remove priests, a conversation which he had with the defendant a few hours after the bishop had written him a letter complaining of his "repeated and public drunkenness," and threatening him with removal from his charge, in which the bishop, after the priest had said that he wished to deny the charge, replied that the priest need not bring witnesses "because his own appearance testified it (the charge) was true;" and, upon the bishop's being asked whether there was any personal liability of the pastor, so far as the sisters conducting the parochial school were concerned, he may testify that "there was in this case; if he failed to carry on the parish and raise the necessary money, I should remove him and put some one in the parish. There was no personal liability on his part, so far as the sisters were concerned, outside of the revenues of the church."

The letter thus written by the bishop, when taken in connection with oral testimony of the bishop as to a conversation with the defendant covering the sub-

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stance thereof, and with proof of the insolvency of the pastor, is admissible upon the question of motive, as it tends to show that an imminent crisis had arisen in the affairs of the pastor, involving, among other things, a need of money upon his part for the payment of his back salary and debts; and it may be inferred that, in burning the parochial school building, he was attempting to realize upon the insurance policies thereon, to the end that, when these moneys came into the hands of the trustees of the church, persons whom the pastor alleged that he was able to control, he could, as he might under the rules of the church, apply the moneys to the payment of the sum which he claimed the church owed him.

Instructions by the court to a jury, relative to section 395 of the Code of Criminal Procedure, to the effect that the defendant's failure to testify as a witness on his own behalf should not create any presumption against him, and that the jury were not to assume that he would deny or admit any of the evidence, but must consider the evidence unaffected by the fact that the defendant did not take the witness stand, is a sufficient charge on the subject.

APPEAL by the defendant, John M. Fitzgerald, from a judgment of the County Court of Monroe county in favor of the plaintiff, rendered on the 8th day of February, 1896, convicting him of the crime of arson in the second degree, and also from an order entered in said clerk's office on the 8th day of February, 1896, denying the defendant's motion for a new trial made upon the minutes.

The bill of exceptions contained all of the evidence given upon the trial as well as the exhibits set out at length.

In the Oyer and Terminer of Monroe county an indictment was found charging the defendant with the crime of arson in the first degree, and contains the following language: "That the said John M. Fitzgerald, on the 17th day of July in the year of our Lord one thousand eight hundred and ninety-five, at the village of Charlotte, in this county, with force and arms, in the night time of said day, unlawfully, feloniously, willfully and maliciously did set fire to and burn the parochial school building of the Holy Cross church, Charlotte, a corporation duly organized, existing and doing business under and by virtue of the laws of the State of New York, then and there situate, and there being then and there within said parochial school building at the time a human being, to wit: James Moran, known to the said John M. Fitzgerald to be within the said building at the time, contrary to the form of the statute in such cases made and provided, and against the peace of the People of the State of New York and their dignity."

After a very protracted trial the jury found a verdict of "guilty of arson in the second degree and recommended mercy."

The defendant was sentenced to the State prison at Auburn for the term of ten years on the 8th day of February, 1896, and a judgment to that effect was entered in accordance with the provisions of law.

Before the judgment was entered a motion for a new trial upon the ground that the verdict was contrary to law and upon several other grounds was made and denied.

David N. Salisbury, for the appellant.

George D. Forsyth, District Attorney, for the respondent.

HARDIN, P. J. :

In July, 1895, there existed at Charlotte a corporation known as the Holy Cross Church, having in its possession several buildings, among others the one mentioned in the indictment and known as the parochial school building. Near to that building was a residence occupied by the defendant, who, since 1881, was pastor in charge of the affairs of such corporation, and had been its treasurer and a member of its board of trustees, which also had two lay members.

To sustain the indictment the People gave no evidence to show that the defendant personally set the building in question on fire, but the theory of the People was that the defendant used as instruments to accomplish the burning of the building two servants in his employ for some time antecedent to the fire. His housekeeper was Nora Cronin, and her brother, John Cronin, was a hired man also in the service of the defendant, and had been for some time prior to the fire; and it was claimed that there was a conspiracy between the defendant and them to commit the crime, and that the defendant, by means thereof, sought to acquire the insurance moneys which might be realized upon policies of insurance which he had caused to be issued upon the building destroyed and the contents thereof, and that his relations had become so embarrassed with regard to the church and the sisters and with the bishop, that he expected to be removed from his position as pastor of the church, and that he

sought, before such removal, to obtain the insurance money with a view of liquidating any indebtedness on the part of the church to him, and with a view of relieving himself from financial embarrassments which then surrounded him.

To sustain the theory of the prosecution, evidence was given of many circumstances claimed to support it. Close and confidential relations existing between the defendant and the Cronins were shown by many facts and circumstances, legitimately tending to show that there was great confidence between the defendant and each of the Cronins who were in his employ.

The defendant had become the owner of numerous parcels of real estate, and had taken title thereto in John Cronin without Cronin's advancing any consideration therefor, or having executed any written evidence in respect to the title so received by him. Some of the real estate was put in Cronin's name without any consideration passing from him, and without any immediate personal knowledge of the same. Several parcels of real estate the defendant had caused to be conveyed to Nora Cronin.

With a view of establishing the relations between the defendant and the Cronins, we think the evidence was properly received of their dealings, and of their doings antecedent to, and subsequent to, the fire.

In the course of the evidence, in respect to the defendant's real estate, it appeared that he had become the owner of numerous lots in Charlotte and some in the city of Rochester, some of which were mortgaged and some of which were taken in his name, and others in the name of the servants already mentioned, and, apparently, the whole volume of evidence upon the subject of his transactions in real estate, justified the conclusion that the real estate owned by him in July, 1895, was valued at about \$38,000 to \$39,000, and that the same was incumbered by mortgages for the sum of \$44,697.

Notwithstanding the objections made by the defendant, we think the evidence of his insolvency in July, 1895, was pertinent.

We are also of the opinion that the facts that the affairs of the parish school were conducted by three sisters, under the supervision of the defendant, and that the relations existing between the defendant and the sisters had become somewhat strained and disturbed, were proper evidence, to be received with a view of determining the

probable continuance of the defendant in his relation to the church property.

Evidence was given tending to show that in December, 1892, a policy of insurance on the building burned was issued by the Home Insurance Company for \$1,500, and that just before the fire occurred, to wit, on the 10th of July, 1895, the defendant caused to be issued, without the knowledge of the other trustees, two policies of \$1,500 each, making a total of \$4,500 upon the building, and also a policy of \$1,400 upon the furniture and fixtures, and \$500 upon other property "sash, doors and blinds in the building."

Evidence was given to show that the building was not worth, at the time of the fire, to exceed \$3,300.

There was some evidence tending to show that the property stored in the school building consisting of sash, doors and blinds, was the property of the defendant, and that he caused the insurance to be taken in the name of the church society, because of some difficulty that he had theretofore experienced in obtaining insurance upon property owned by him; and there was evidence tending to show that, with a view of obtaining such insurance upon the sash, blinds, etc., the defendant had assumed to give the property to the church. The sash and blinds seemed to be an accumulation of property obtained from other buildings, and there was some evidence tending to show that it belonged to the defendant, who had been engaged in building houses himself, and in that business had accumulated the odds and ends which were covered by the \$500 policy.

The evidence tended to show that, on the tenth of July, the defendant entered the office of Zimmer, an insurance agent in the city of Rochester, and obtained a policy for \$1,500 on the school building, and \$1,400 upon the school furniture and \$500 upon the sash, doors and blinds. He did not then disclose to the agent that there was at that time \$1,500 on the building in the Home Insurance Company. On the same day the defendant went to Vay, another insurance agent, having an office in the Powers block, Rochester, and procured a policy upon the school building for \$1,500; nor did he disclose to Vay that he had solicited through Zimmer \$1,500 upon the building, and \$1,400 upon the furniture and fixtures and \$500 upon the sash, doors and blinds. The policy of insurance which he obtained from the agent, Vay, did not contain a permit for

other insurance. However, on the morning of the sixteenth of July the defendant sent Nora Cronin to the office of Vay with the policy, and she reported to the agent that the defendant had sent her there to have the words "Other insurance permitted" inserted in the policy. She reached Vay's office about eleven o'clock in the forenoon of the sixteenth of July, and after the words were inserted she returned to Charlotte. The evidence tended to show that the defendant, on the morning of the sixteenth, about nine o'clock, learned from Schwartz, the New York Central railroad agent, that he could find a train at Rochester and reach Troy if he left Rochester at ten o'clock, and after obtaining that information defendant returned to his house, and, with his satchel in his hand, took an electric car for the city of Rochester. Shortly after Nora Cronin took another car and followed to the city of Rochester. Before the defendant left Charlotte he had perfected an arrangement to have an entertainment take place in the school building that night, and, in the absence of that entertainment, it was suggested by the evidence that no fire was in use in the building, as there had been no school after the seventeenth of June. The entertainment arranged for was to be given by the Ellises, itinerant show people who were accustomed to engagements at the Bartholomay pavilion, a sort of a summer garden, and they occupied one of defendant's houses, and he had arranged with them to give an entertainment in the schoolhouse, which arrangement was made the Monday before the entertainment. It seems that the Ellises had procured a definite arrangement with the Bartholomay people and they sought to give up the appointment in the schoolhouse, and when they communicated that fact to the defendant he seemed to be disturbed by it and became agitated and threatened to denounce them in the public prints if they did not keep their engagement with him. It was finally arranged that they should give an entertainment after the one closed at the pavilion, and after ten o'clock at night. In pursuance thereof, the Ellises gave the entertainment at the school and the same was not concluded until eleven-thirty P. M., or about midnight.

According to the evidence the defendant went, on the sixteenth of July, to Troy, and there made a purchase of laundry machinery making a bill to the extent of some \$1,167.

There was evidence given tending to show that he was then insolvent and that there were executions outstanding against him.

Evidence was given tending to indicate clearly and directly that John Cronin set the fire that consumed the schoolhouse building some time near two o'clock in the morning of the seventeenth of July. Cronin had the keys to the schoolhouse and had charge of it, and on the night of the entertainment he was the last one who left the building, at about the hour of twelve o'clock.

The evidence discloses that, by reason of certain circumstances that had transpired, one Dennis and others undertook to watch the schoolhouse building on the night of the sixteenth, and that Dennis saw John Cronin come out from the parochial residence and go in the direction of the schoolhouse, passing in the path between the sisters' house and the schoolhouse on the south side. Dennis was a police officer and he watched the schoolhouse and saw the blaze therefrom, and shortly thereafter saw a man dash out from the west end of the schoolhouse, and Dennis called to him to halt in a loud voice and gave chase to the man. The man ran at full speed into the defendant's house, entering the kitchen door with the officer in close pursuit at a distance of six or eight feet, and when the officer entered the room Nora Cronin stood by the dining-room door dressed in her usual apparel, with her hair done up and with an ordinary kerosene lamp in her hand, lit, and the officer was, by means of that light, enabled to identify John Cronin. Nora then caught hold of the officer and blew out the light and placed herself between the officer and the door through which John Cronin went, and the officer ordered her to stand back, and he called out to his assistants to "come on, boys." Thereupon Keon and Wickham, pursuant to an arrangement entered into between them and Dennis to watch on that night, started to run from the points where they were stationed, and Keon entered the house and Wickham went to the front door. A light was struck and search made of the house, Nora Cronin following them through the house; they attempted to take down the front hall light, and then and there Nora Cronin attempted to blow out that lamp. They made a search of the house and did not find John Cronin therein. When he entered the house he had no hat on, and, apparently, had no shoes on. When Cronin was subsequently arrested and taken to the lockup, he procured a

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hat and shoes from the defendant's house and gave up those that he then had as they did not fit him.

The circumstances of discovering the fire and of the presence of John Cronin, as detailed by Dennis, are to some extent corroborated by the witness Wickham, and the testimony of Sister Edwards and of Sister Mary Joseph tends to corroborate the testimony of Dennis. The testimony of Dennis, although attacked severely by cross-examination and otherwise by the defendant, supported as it was by the testimony of witnesses we have already mentioned, and by the circumstances disclosed in the evidence, presented a question of fact for the jury to determine, and supported a finding made by the jury to the effect that the fire was set by John Cronin under the circumstances narrated by the witness Dennis.

It appeared by the evidence that John Cronin absconded and was not arrested until the eighteenth of July.

The evidence indicated that before Cronin was arrested the defendant made some contradictory statements in respect to his whereabouts in his efforts to account for his absence.

After the People had given all of the facts and circumstances that related to the actual occurrence of the fire and the circumstances relating to the departure of the defendant from Charlotte on the morning of the sixteenth, they placed in evidence a telegram which was prepared by the defendant while *en route* to Troy, and it is of so great importance in the link of evidence that is relied upon by the People to establish the guilt of the defendant that the same is here produced. The language of the telegram is as follows:

"SYRACUSE, N. Y., July 16, 1895.

"Miss NORA CRONIN (care of Father Fitzgerald, Charlotte, N. Y.):

"Tell Mr. Ellis I was called away suddenly; return if possible to-night. Have Johnnie close all doors and lights out after entertainment; many tramps now in Charlotte; use your own best judgment.

"JOHN M. FITZGERALD."

The telegram, apparently, was written upon a scrap of paper and pasted upon a blank of the telegraph company. The message was delivered to Nora Cronin, and the circumstances attending its delivery and the knowledge thereof of John Cronin are referred to in the evidence somewhat in detail. The defendant returned to

Charlotte on the seventeenth, and a newspaper reporter by the name of Otis interviewed him in respect to the circumstances of the fire. Thereupon the defendant stated to Otis that he had sent a telegram to Nora and the nature and character of it. In speaking of that interview Otis testified, viz.: "He said, 'Otis, I have something to show you. I want to know what you think of it; something I treasure very much,' or something of that sort; the exact words I cannot remember. He took from his pocket a telegram and a letter. He showed me the telegram, he taking hold of it by one hand and I the other. To the best of my recollection it was dated Syracuse, and was addressed to Nora Cronin, and said, 'Be sure and put out all the lights, as the village is infested by tramps.' The letter was in typewriter, and was a schedule or bill of laundry machinery. * * * He said he had received this bill at Troy, and he said, to the best of my recollection, that he was nervous about the entertainment, and had got off the train at Syracuse and had sent this telegram to Nora. He asked me what I thought about these things; asked if I did not think it would be an awfully good idea to keep these in his possession to keep to show. I asked if he really wanted my advice about* and he said he did, and I said if I was him I would not show them to anybody else, but put them in his pocket and keep them; not to holler before he was hurt; that he might show them to his attorney and get his advice."

In the course of the charge delivered by the learned trial judge, he carefully and cautiously submitted to the jury the language of the telegram and commented upon the significance that should be given to it in connection with the other circumstances in the case, and confided the whole circumstances to the jury to determine therefrom what inferences should be deduced, and what force and effect the language of the telegram, which has been quoted, should receive.

No evidence was given tending to show why the defendant was absent the night of the entertainment beyond such as is furnished by the purchase of the laundry supplies, and no reason is offered in explanation of the telegram sent to Nora two or three hours after parting with her.

In *Gordon v. The People* (33 N. Y. 501) it was held: "The

* Sic.

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absence of an attempt to account for his whereabouts, when it appears to be in the power of the prisoner to do so, is strong presumptive evidence against him. But the force of such circumstance must be left for the consideration of the jury; and it is error for the court to instruct them that it is of a 'conclusive character,' or that, by such omission, doubtful evidence of guilt 'ripens into certainty.'"

In respect to the evidence which we have adverted to, as well as many other circumstances which have not been enumerated, the learned trial judge instructed the jury in accordance with the doctrine of the case from which we have quoted.

In *Schwier v. N. Y. C. & H. R. R. Co.* (90 N. Y. 564) it appeared that there was an omission to call a witness, and DANFORTH, J., said that omission "is not evidence against the defendant of the existence of any fact; it is cause for taking such testimony as is in the case—and which, if untrue, he might have contradicted or explained—most strongly against it." That case was followed in *Kenyon v. Kenyon* (88 Hun, 214). The same doctrine was laid down in *People v. Hovey* (92 N. Y. 560), in which latter case it was said: "A jury would have the right to infer that the evidence of an eye-witness to a transaction would not be favorable to a party who voluntarily excluded such witness from testifying in the case." And in *Byrne v. Brooklyn City & N. R. Co.* (58 N. Y. St. Repr. 128) it was held: "A weak case for plaintiff is made strong when a witness who could contradict it is not called by the defendant."

The rules thus laid down in the cases to which we have just adverted were observed with great faithfulness by the learned trial judge in the course of his charge to the jury.

When Dennis, a witness sworn in behalf of the prosecution, was describing the circumstances of discovering a man going to the building just before the fire broke out, he said: "I was watching the schoolhouse and all at once I seen a light in the basement of the schoolhouse, and in a very short time a man dashed out from the direction of the west end of the schoolhouse. He was running and I hollered 'halt' and ran after him, and I ran him into Father Fitzgerald's house. He went in the kitchen door and as I opened it he was going through another door. The man I chased into the house was John Cronin. I have no doubt upon that subject. There was

a light in there. Nora Cronin was there standing in the dining room door with a lamp in her hand." When the witness was asked to "describe her appearance," objections were interposed by the defendant to the effect that the evidence was immaterial and incompetent, and the objections were overruled and an exception was taken. The witness answered: "She was dressed in ordinary clothes, the same as women use generally in the house. Her hair was done up the same as if she had been to work. I went up to her and took the lamp out of her hand." Defendant objected to the proof of anything that took place between the witness and Nora Cronin as incompetent. The court in announcing his ruling said that he should receive "as much of the transaction as seems to me to be clearly a part of the *res gestæ* in regard to the flight of John Cronin. Of course, that must not be extended too far; but the moment Mr. Dennis rushes into the kitchen and John Cronin leaves by another door, he following, and Nora Cronin interferes, it seems to me it is a part of the *res gestæ*, and competent for that reason." The defendant took an exception to the ruling. We think the exception presents no error.

When Frank Ellis, the theatrical performer, was upon the stand, he stated the circumstances relating to the entertainment, and that it closed about half-past eleven, and the departure of the audience, and that thereupon he went to the house of the defendant and saw Nora and had a talk with her, and when he was asked to state it, objections were taken that it was incompetent and immaterial; the objections were overruled and an exception was taken. The witness said: "I saw Nora; I said, 'Nora, is Father John home?' She says, 'No.' I says, 'Do you think he will be home to-night?' She says, 'I do not think he will.' I asked Nora if she had received a telegram; she said, 'No.' I asked her if she received a telegram for me; I believe that was the question." We think no prejudicial error was committed in receiving the evidence. There was no motion made to strike out the evidence at the close of the case. (*Place v. Minster*, 65 N. Y. 106.)

We do not think it was error to receive the testimony of John Cronin as to his whereabouts portions of the night of the sixteenth of July. He was asked to state whether, before he went to O'Brien's on the sixteenth or the morning of the seventeenth, he heard the

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fire bells ring. That question was objected to by the defendant, and the witness answered, "Yes, sir," and he added that, before he went to O'Brien's that night he saw a hose cart on Lighthouse avenue. We think the exception presents no error.

The testimony of Wolf, the bookkeeper of Zimmer, the insurance agent, fully describes the circumstances attending the application on the 10th of July, 1895, for policies of insurance of \$1,500 on the building, and \$1,400 on the schoolhouse furniture and fixtures, and \$500 on the building material in the basement. The witness was allowed to testify that certain cancellations of policies obtained in that agency theretofore had taken place, and the knowledge of the defendant in respect to the cancellation of policies issued to the defendant; and in the cross-examination the witness was asked in respect to his hesitation about issuing policies on the tenth of July, and the fact was drawn out from the witness that the policies then applied for "were not taken out in the name of" the defendant. The witness was then asked, "What was the hesitation on the 10th of July?" This question was objected to by the defendant as incompetent and immaterial, and the objections were overruled and an exception was taken. The only answer the witness made was, "I referred the risk to Mr. Zimmer first, to see whether he would carry it." The witness then refers to an interview he had with Zimmer, and thereafter he was asked, "Why did you hesitate?" That question was again objected to and an exception taken, and the witness was allowed to answer as follows: "Well, I wanted to get Mr. Zimmer's opinion first as to whether he would carry it. I knew they wouldn't carry any insurance in Father Fitzgerald's name, and I thought perhaps he would write it in that shape, and that was the cause of the hesitation." We think the exception presents no error. (*Blumenthal v. Bloomingdale*, 100 N. Y. 562; *Simmons v. Havens*, 101 id. 428.)

Zimmer, the insurance agent, was called and testified to some of the circumstances attending the issuing of the policies on the 10th of July, 1895, and to a conversation had with the defendant, and then he referred to certain letters he had received from the insurance companies subsequently, and to a conversation he had with the defendant on the fifteenth of July, and when the witness was asked what was said on the subject to defendant, there were objections

made and overruled and exception taken, and the witness answered, viz.: "I told him we had notice from the Rochester Insurance Company that we must cancel. He asked me at that time for a vacancy permit, and this answer came from the Insurance Company that we must not grant any more permits to Father Fitzgerald. Also insure nothing in Charlotte, especially on Father Fitzgerald's property. That is what I told Father Fitzgerald. * * * Told him that these companies objected to insuring any more property for him or in his name. * * *" We think the exception presents no error.

The conversation which Van Valkenburg, the general agent of one of the insurance companies, held with the defendant in which the witness stated, viz.: "I told him previously we had forbidden our agents to insure property he had anything to do with. He asked why. I told him he had altogether too many fires, and that the property he had lost by fire was always insured for more than it was worth, and I thought we had sufficient experience with him to justify us in letting his business alone. He wanted to know how many fires he had had, and I stated to him, first, there was a church, an old church used as a schoolhouse in 1882—in the fall of 1882, or the winter of 1882, I think. Then there was a house or two and a barn, and a shoe factory and a hotel. He asked me if we had been interested in all of them. I told him I thought not quite all, but had our share. I told him I could not state definitely quite all, but I recollect several. He asked me if I meant to insinuate that there was anything wrong about those fires—anything of a criminal nature to them. I told him I did not mean to intimate anything, just stated facts. * * * That was the occasion on which he said the money was his and he would have it. He said that insurance belonged to him and he was going to have it." This testimony was received without objection being taken thereto by the defendant.

The witness Miller was called to prove that he held a mortgage on a certain piece of real estate, and he detailed a conversation which he had with the defendant to the effect that certain policies of insurance had been canceled, and that an insurance was effected in the name of John Cronin, to whom a deed had been given of the property. The witness added: "I had endeavored and he had

endeavored to effect insurance upon this property, and he said he would have the property transferred to someone else in order to effect the insurance. He mentioned in that connection Nora Cronin and some party, I think, Jennie McCarthy." The conversation was objected to. We think it was competent as bearing upon several important questions involved in the trial.

After the witness Zimmer had been permitted to detail the conversations which he held with the defendant in respect to the adjustment of the loss, he referred to the fact that he had received notice not to pay from the bishop through Father DeRegge. When the witness was asked whether there was a communication from Bishop McQuaid with reference to the insurance, it was objected to as immaterial and incompetent, and the court ruled: "For the purpose of fixing the date of the conversation." To that ruling the defendant excepted. We think the ruling presents no error. The defendant, in that conversation, demanded the payment of the insurance money to himself, and the witness adds that the defendant said: "They will do anything I tell them. He gave me the names of the trustees. * * * He said they were trustees with him, and he forming the third, the majority, this money must be paid to him." In the same conversation the witness states that the defendant said: "Anyway there were two trustees and himself that had the management and the only ones could be settled with, and if we settled with Bishop McQuaid or any one else he would hold us responsible."

Nor do we think it was error to receive the testimony of the conversation held with the defendant on the subject of the settlement of the losses, or to receive what the defendant said in respect thereto, in the following language: "He said he was willing to sacrifice a little of it if they would make a settlement with him then and there." And, in speaking of the claim of the bishop, that the money should be paid to him, the witness testifies that the defendant said: "They cannot get that money; you cannot deal with anybody else but me, and if you settle with anybody else, I will settle with you."

Before the evidence was received, to which we have just adverted, there was testimony to the effect that the bishop was *ex officio* a member of the board of trustees, and there was also extensive evi-

dence elucidating the relations which the bishop bore to the church society and to the defendant.

We think it was not error to receive the evidence of Boylan and Rebodou, trustees, to the effect that they had no part in obtaining the insurance in July, 1895, and that the same was obtained by the sole act of the defendant upon the properties that were destroyed.

Bishop McQuaid, of the diocese of Rochester, was called as a witness for the People, and he testified to an interview with the defendant on the 11th of July, 1895, at St. Bernard's Seminary, about ten o'clock in the morning, and the witness added that he knew the occasion of the defendant's visiting the seminary, and said: "It was in reference to a letter which I had written him. It was written either the evening before or early that morning, I am not certain which. I think it was that same morning. I may have written it late the evening before, but think early that morning, and sent it to him. The paper now shown me is a copy of that letter. I saw him two or three hours after that letter was sent to me (him). He then said something on the subject of this letter." The witness was then asked: "Q. What did he say upon the subject of this letter?" This question was objected to by the defendant as incompetent and immaterial and irrelevant. The objections were overruled and the defendant took an exception. The witness answered: "He said he wanted to deny the charge. That the charge I had made was not true. I didn't see the letter with him at that time. He wanted to prove the charge made in the letter was not true. I said it was not necessary to bring witnesses, because his own appearance testified it was true." The original letter was then produced, and the bishop added: "That is in my handwriting, and is the original letter." The original was then offered in evidence, and it was objected to by the defendant "as incompetent and immaterial;" the objections were overruled and the defendant took an exception. The letter was received and marked Exhibit No. 44. The bishop continued his testimony, and said: "I have been bishop of the diocese of Rochester 28 years next July, and know the law of the Catholic church with reference to the powers of the bishop. At that time I had power to remove defendant. There was a rule which governed the priests in this diocese with regard to making regular annual report. The trustees of each of the several cor-

porations which are of the churches in this diocese consisted of the bishop, vicar-general, the pastor and two lay trustees of the congregation. These reports which were sent in pertained to the financial condition of the church. All of the moneys which were received from the churches of the parish were kept within the parish. The report was simply a statement for my examination as to its financial condition. The moneys raised from whatever source, for the benefit of the church and the carrying on of its charge, remained at all times in the custody of the pastor and the two lay trustees. There was also a rule with reference to the amount of salaries which were paid to pastors. Their salaries were to be raised out of the sums to be supplied in the parish. The annual salary of the pastor of this particular charge was \$700."

In the course of the cross-examination the witness was asked whether there was any personal liability on the part of the defendant, as far as the sisters were concerned, and he answered as follows: "There was, in this case; if he failed to carry on the parish and raise the necessary money, I should remove him and put some one in the parish. There was no personal liability on his part, so far as the sisters were concerned, outside of the revenues of the church."

We think the conversation between the bishop and the defendant, on the eleventh of July, was competent, and was properly received. It tended to elucidate the relations existing between the defendant and his church and its superior officers, and to develop the exigencies which then were surrounding him, and his relations to its temporal affairs and his relations to his bishop. It tended to develop the fact that a crisis had come to him in respect to his relations with the church. Confessedly the bishop was his superior in ecclesiastical relations, clothed with power to remove him from his pastorship of the church. It tended to develop facts which might legitimately be said to be potential in influencing the act and conduct and demeanor of the defendant towards the church and its property, and tended to elucidate the motives of his conduct immediately succeeding the interview.

We come now to consider the more potential objection urged to the reception of the letter in evidence, and, before considering the objection, we will quote the letter of the bishop to the defendant:

"ST. BERNARDS, *July 11, 1895.*

"REV. J. M. FITZGERALD :

"REVEREND SIR.—Of late so many complaints have come to me of your repeated and public drunkenness that I cannot close my eyes any longer to your conduct. I now give you warning that, if you do not quit the use of intoxicating drinks altogether and reform your life, I shall be obliged to send you to a house of correction and remove you from the charge of souls. Your usefulness in your present mission is at an end, and the sooner you seek some other field of work the better it will be for yourself and for religion.

"Very respectfully,

"B. J. McQUAID,

"*Bishop of Rochester.*"

The principal objection now made to the reception of the letter seems to relate to the circumstance that it contained a charge against the defendant of intoxication, or, to be more accurate, in the language of the letter, "public drunkenness." No parts of the letter were objected to, at the time it was offered, by the defendant; on the contrary, his objections thereto were to the entire letter, and it is not too much to assume that if any part of it was proper he should have made specific objections to such parts as were improper. As to that part of it relating to intoxication, it is to be borne in mind that the bishop, in detailing the conversation held with the defendant, had already introduced very clearly the nature and tenor of the charge which he had made in the letter and which he stood by and repeated in the interview with the defendant. If we recur to the testimony of the bishop we find that he says, in relation to the interview with the defendant as follows: "He wanted to prove the charge made in the letter was not true. I said it was not necessary to bring witnesses, because his own appearance testified that it was true." The natural and ordinary understanding of the language just quoted from the testimony of the bishop indicates that he had reference to the habit which the letter refers to in definite language. It is, therefore, not apparent that the letter of the bishop conveyed to the jury any further or different idea than was introduced by the conversation which was held between the bishop and the defendant, as revealed in the bishop's testimony. All this evidence was received with a view of enlightening the jury as to the motive which may

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have actuated the defendant in respect to the principal charge made in the indictment. The testimony of the bishop tended to show that an imminent crisis had arisen in the affairs of the defendant. The testimony also tended to show that the defendant was financially embarrassed; that his circumstances were such that if he was immediately removed from the parish he would lose the balance of the salary due to him, and that his financial standing would be exposed, and that he would be unable to liquidate his debts, and, therefore, there was immediate and present necessity for turning some of the property into money with a view of its coming from the insurance policies to the hands of the trustees, whom he was able to control, and, under the rules of the church, to apply such money towards the liquidation of the balance of indebtedness which he claimed against the church of the Holy Cross.

Great latitude is allowed in developing facts which tend to show the motive of a party accused of crime.

Judge E. DARWIN SMITH, in an opinion delivered in *The People v. Stout* (4 Park. Cr. Rep. 129), said: "It is impossible to define by any rule, or put limits upon the facts that may be given in evidence in proof of motive, except that they must relate to the subject-matter, and be rationally adapted to establish the fact in issue. It is not necessary that the connection be so intimate as that the proof of one fact unavoidably involves or draws after it the other, as a legitimate and necessary consequence from an appropriate cause. It is sufficient if the evidence fairly tends to prove the assumed motive, and the jury may rationally and properly imply the motive from the act sought to be given in evidence. (*State v. Baalam*, 1 Starkie Ev. 502.) So various are the motives which govern men and so indefinable that every case must necessarily be governed by its own particular circumstances. As various as are the objects of ambition, passion or desire among men, so various may be the machinations and motives to crime, and so various must necessarily be the kind and species of evidence adopted, and proper to be received, to explain the motives and principles of human conduct, to unravel and reveal the webs and wiles of criminal purpose, and bring the offenders to justice."

In *Pierson v. The People* (79 N. Y. 436) it was said: "Where the case depends upon circumstantial evidence, and the circumstances

point to any particular person as the criminal, the case against him is much fortified by proof that he had a motive to commit the crime. Where the motive appears, the probabilities created by the other evidence are much strengthened."

In *People v. Harris* (136 N. Y. 450) it was said: "The rule that evidence in criminal cases should be confined strictly to the question in issue is not infringed upon, because the evidence offered, while tending to prove some essential fact in the guilt of the accused, may also prove the commission of another offense. Such evidence is relevant and admissible whenever its presence goes to sustain the charge by showing scienter or motive, for these facts are essential elements of crime."

Considering the whole volume of evidence relating to the questions presented in regard to the defendant's motive, the letter may be regarded as an official notification by the bishop that the defendant's relation to the church and its property was soon to terminate, and that unless he was able to obtain moneys through the instrumentality of the policies of insurance he was likely to be removed without his arrearages of salary being liquidated. The whole tenor of the evidence indicates that the defendant was possessed with the idea that, if the insurance money was received by the society, he could so dominate his associate trustees as to become the possessor of it, and thus liquidate the supposed indebtedness of the society to him, and aid him in extricating himself from the financial embarrassments surrounding him. So far as there was anything damaging in the letter to the defendant, it was in entire harmony with, and in corroboration of, the position assumed by the bishop in the interview which he held with the defendant, and, as we have before stated, the declarations made by the defendant to the bishop were competent evidence upon the question of the defendant's motive. The interview took place on the eleventh of July, and, according to the evidence, the additional insurance policies were obtained on the tenth of July, and the defendant left Charlotte on the sixteenth, and on that day returned a telegram which has already been alluded to, and the fire occurred the following morning.

With all this evidence before the jury it was for it to draw such deductions and inferences therefrom as legitimately the evidence gave rise to.

The bishop testified that "there was no reason and no objection to the trustees passing a resolution to pay him back salary. If he had the money in his hands, he might pay it if he chose."

A very clear and exhaustive charge was delivered by the learned trial judge relating to the circumstances developed in the evidence, calling their attention to the rules of evidence and to the rules of law applicable thereto, and in the course of the charge he said: "I have been requested to charge you, gentlemen, that the fact that the defendant went voluntarily before the grand jury and told his story, but has not taken the witness stand here, should not raise any presumption against him. That is true." And later on he said in referring to the statute: "It says the jury are not to assume that he would deny or admit any of the evidence, but that the jury must consider that evidence as it stands, unaffected by the fact that the defendant does not take the stand." We think the instruction thus given was a sufficient compliance with section 393 of the Code of Criminal Procedure, which declares that a defendant's neglect or refusal to testify does not create any presumption against him.

In *People v. Rose* (52 Hun, 39), in referring to this statute, it was said: "Its particular meaning is that the court and jury must, so far as they can, determine his case without prejudice or inference against him, founded upon his omission to testify." The exception was a general one to all that the court said to the jury in explanation of the statute.

In response thereto the court observed: "Is there any particular expression of the court that you wish to point out? I may have made some inadvertent statements in that respect that might be corrected." In response to that the counsel for the defendant said: "Where your Honor stated that his failure to take the stand was not a denial, etc." We think the exception presents no error.

Numerous exceptions were taken to the charge as delivered, and to refusals of requests made, and they have received attention, and none of them have been found to present prejudicial error.

The case seems to have been very thoroughly tried in behalf of the contending parties, and intelligently and clearly submitted to the jury under proper rules of evidence and well-settled rules of law, giving to the defendant the full benefit of the presumption of innocence until the contrary should appear.

Whether there was a conspiracy or not, promoted by the defendant, to burn the building on the 16th of July, 1895, was a question of fact for the determination of the jury.

In *People v. McKane* (143 N. Y. 470) it was said: "When a conspiracy is shown, or evidence on the subject given sufficient for the jury, then the acts and declarations of the conspirators, in furtherance of its purpose and object, are competent, and in a case like this it is not necessary, in order to make such proof competent, that the conspiracy should be charged in the indictment."

The trial judge instructed the jury in respect to the nature and character of circumstantial evidence which the law requires in order to prove the main allegation. His instructions complied with the rule laid down in the case to which we have just adverted, in which it was said: "They were instructed to acquit the defendant unless satisfied beyond a reasonable doubt that he counseled, advised, aided, abetted or procured" the commission of the crime charged. Numerous other exceptions were taken during the progress of the trial which have not been referred to in this already too protracted opinion. However, they have received attention and an examination of them has not left upon our minds the impression that any of them present such error as requires us to disturb the verdict of the jury.

Section 542 of the Code of Criminal Procedure lays down a rule to be observed by the court in the following language: "After hearing the appeal, the court must give judgment, without regard to technical errors or defects or to exceptions which do not affect the substantial rights of the parties." That section has been construed and applied in *People v. Chacon* (102 N. Y. 669); *People v. Dimick* (107 id. 13); *People v. Doyle* (11 App. Div. 448).

In *People v. Stout* (*supra*) it was said by Judge E. DARWIN SMITH, "It is obviously due to the public interest and to the faithful administration of public justice, that courts of review should not reverse the proceedings of inferior courts upon slight and trivial grounds." However, if reading the evidence in the large volume produced upon the appeal, we were satisfied that prejudicial error had been committed by the trial judge, and that the jury in consequence thereof had gone wrong, we should feel it our conscientious duty to reverse the judgment entered upon the verdict. The great

question of the defendant's guilt or his innocence was fairly and intelligently submitted by the trial judge to his peers, and their verdict is adverse to the defendant. We have found no sufficient ground to justify the court in interfering with the conclusion reached by the jury.

Judgment of conviction and order affirmed, and the judgment to be entered, certified and remitted to the clerk of Monroe county, pursuant to section 547 of the Code of Criminal Procedure.

All concurred, except FOLLETT, J., not sitting.

Judgment of conviction and the order affirmed, and judgment to be entered, certified and remitted to the clerk of Monroe county, pursuant to section 547 of the Code of Criminal Procedure.

MARGARET MAHER, Respondent, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

Negligence — testimony of a physician as to the permanency of injuries and their probable effect — contradicting a witness by proof of his own statements.

A physician, who examined an injured person and has testified that in his opinion she was suffering from spinal irritation, may give his judgment as to whether the difficulty will prove permanent, and what effect upon the system it will have, and may describe the probable effect, such as "nausea and vomiting, and also disturbed action of the heart, faintness, and affected the pulse, make it weak, perhaps irregular, produce pallor of the skin," etc. Such evidence is not mere conjecture, but expresses the deliberate judgment of a man of science, based upon actual observation or experience, as to results and conditions which might naturally and ordinarily be anticipated.

Where a witness has testified upon a subject which is material to the issue, it is competent to prove prior declarations made by him which were inconsistent with and contradictory of his testimony given upon the trial, even though the impeaching evidence may incidentally have some bearing upon the main question.

GREEN, J., dissented.

APPEAL by the defendant, The New York Central and Hudson River Railroad Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the

county of Orleans on the 24th day of December, 1896, upon the verdict of a jury, and also from an order entered in said clerk's office on the 24th day of December, 1896, denying its motion for a new trial made upon the minutes.

Charles A. Pooley, for the appellant.

S. E. Filkins, for the respondent.

ADAMS, J. :

This case has been twice tried. Upon the first trial it was determined, as matter of law, that the plaintiff was guilty of contributory negligence, and for that reason a verdict was directed in favor of the defendant. Upon a review of the case in this court it was held that a question of fact respecting the plaintiff's negligence was presented by the evidence, which should have been submitted to the jury, and a new trial was, therefore, ordered. (5 App. Div. 22.)

So far as we are able to discover, from a careful reading of the record now before us, the facts are substantially the same as upon the former appeal. The plaintiff swore one or two additional witnesses upon the last trial, and the defendant was forced to call one or two who had testified on behalf of the plaintiff upon the former trial. But, nevertheless, the evidence as a whole remains essentially unchanged, and after further consideration of the questions which it presents, we find no occasion to modify the views which were entertained and expressed by this court upon the first appeal.

The undisputed evidence clearly justifies the conclusion that the defendant's train did not stop at the County Line station, which was the plaintiff's destination, a sufficient length of time to enable her to alight therefrom, and that in starting the same under the circumstances detailed by the witnesses, the defendant's officers and servants were unmindful of the obligations which they were under to the plaintiff as a passenger. As to the other and more serious question, of the plaintiff's alleged negligence in attempting to leave the train in the manner she did, we can only repeat that we think a question of fact was fairly presented for the jury to determine, and we must, therefore, regard their verdict as conclusive upon that issue.

In this situation of affairs, we do not feel called upon to reconsider the principal questions discussed with so much elaboration by

the learned counsel, but will direct our attention to the examination of two or three exceptions which were taken to the rulings of the trial court.

A Dr. Chapman was called as a witness to give evidence as an expert respecting the plaintiff's physical condition. After describing what he had discovered from the several examinations made by him, a hypothetical question was put to him, in response to which he testified that in his opinion the plaintiff was suffering from spinal irritation. The witness was then asked to describe that disease and to state whether, in his judgment, based upon his examinations, as well as upon the facts assumed in the hypothetical question, the difficulty would prove permanent in its duration. This question was objected to as incompetent and speculative. The objection was overruled, and the witness answered that, taking all the circumstances into consideration, he was inclined to say that it would.

He was then asked what effect upon the system a permanent spinal irritation would have. This question was in like manner objected to, but the witness was permitted to answer it by saying that the effect would be "nausea and vomiting, and also disturbed action of the heart, faintness and affect the pulse, make it weak, perhaps irregular, produce pallor of the skin, etc."

Several other questions of like tenor were asked of this witness, as well as of others called on behalf of the plaintiff, to all of which objections were duly raised, and to the decision of the court overruling the same, exceptions were properly taken.

It is now urged that the reception of this class of evidence was error, within the rule laid down in the case of *Strohm v. The N. Y., L. E. & W. R. R. Co.* (96 N. Y. 305) and other cognate cases. We are inclined to think that the defendant's objections to all of these questions were somewhat general, and that they might for that reason possibly be disregarded. (*Turner v. City of Newburgh*, 109 N. Y. 301; *Wallace v. The Vacuum Oil Co.*, 128 id. 579.) But it is perhaps better to meet the issue which the counsel seeks to present, by calling attention to the distinguishing features of the cases cited from the one at bar.

The *Strohm Case* (*supra*) is the leading one upon this subject, and we are not aware of any other in which the rule here invoked is

carried to a greater length. In that case, as in this, a witness had testified as to the result of a physical examination of the plaintiff and also as to what the symptoms discovered by, and related to, him indicated, and then in response to a further inquiry, he stated that the plaintiff's injury was "very likely to be permanent."

Being asked to explain what he meant by "very likely," the witness replied that worse conditions *might* develop, and then proceeded to further explain that a patient sustaining such injuries as the plaintiff had sustained, and presenting such premonitory signs, *may* develop insanity, or any one of several other maladies which were specified.

This character of evidence manifestly furnished the jury an opportunity to speculate as to consequences which were merely remote possibilities, and for that reason it was held to be improper. But in the case under consideration, the several witnesses were simply permitted to testify what effect certain conditions which had been ascertained would produce upon the plaintiff's system, what causes would naturally induce such conditions, and the probable duration of the same. This evidence was something superior to and beyond mere conjecture, for it expressed the deliberate judgment of men of science, based upon actual observation and experience, as to results and conditions which might naturally and ordinarily be anticipated and not as to those which were only within the range of possibility. It was, therefore, of some value to the jury and competent for the purpose for which it was received. (*Turner v. City of Newburgh*, *supra*; *Griswold v. N. Y. C. & H. R. R. Co.*, 115 N. Y. 61; *McClain v. Brooklyn City R. R. Co.*, 116 id. 459-469; *Stever v. N. Y. C. & H. R. R. Co.*, 7 App. Div. 392; *Griffith v. U. & M. R. Co.*, 17 N. Y. Supp. 692; *affd.*, 137 N. Y. 566.)

Another exception to which the defendant's counsel apparently attaches considerable weight, was taken to the evidence of the plaintiff's witnesses, Fermoile and McDonald, who were permitted to testify that the defendant's witness, Pearl Hall, had stated to the former in the presence of the latter, that the train in question did not stop, but only slacked up and went right on; that "When those fellows (meaning the defendant) had to pay four or five thousand dollars, it will learn them to stop. That is the worst conductor on

the road. Why, only the other day they had to stop and back up to let a woman off."

This conversation having occurred immediately after the accident, it is contended that, within the rule laid down in *Sherman v. D., L. & W. Ry. Co.* (106 N. Y. 542), it was error to receive evidence thereof. In our opinion, however, there is little or no analogy between the circumstances of the two cases. In the one cited the objectionable evidence was not designed so much to contradict or impeach a witness as it was to draw out a narrative of a past occurrence which would tend to establish the fact of the defendant's negligence, whereas, in this case, the evidence objected to was intended primarily to contradict the witness Hall, who had sworn that, according to his best judgment, the train did stop "about half a minute," and upon being asked if he had not made the statement above quoted to McDonald and others, he replied that he had no recollection of it. The witnesses McDonald and Fermoile were then called and the precise question was put to them which had been asked of Hall.

This was manifestly the proper method of contradicting the witness, and as he had testified upon a subject which was quite material to the issue, it was certainly competent to prove declarations made by him which were inconsistent with, and contradictory of, his present statements under oath, even though such impeaching evidence may incidentally have had some bearing upon the main question. (Whart. on Ev. § 552; 1 Rice on Ev. 286; *Homer v. Everett*, 91 N. Y. 641; *Greenfield v. People*, 13 Hun, 242.)

We have duly considered the several exceptions taken to the charge, as well as those taken to the refusal of the learned trial justice to charge in accordance with the request of the defendant's counsel, without discovering any prejudicial error which would justify us in directing a new trial, and we conclude, therefore, that the judgment and order appealed from should be affirmed.

All concurred, except GREEN, J., dissenting, and FOLLETT, J., not sitting.

Judgment and order affirmed, with costs.

REVERE RUBBER COMPANY, Respondent, v. GENESEE VALLEY BLUE
STONE COMPANY, Appellant.

The Municipal Court of Buffalo — it has no jurisdiction of an action between two domestic corporations non-residents of Erie county.

The Municipal Court of the city of Buffalo has no jurisdiction over an action between two domestic corporations, neither of which is shown to be a resident of, or to have its principal office or place of business in, or to have been in the county of Erie at the time when the action was begun, the officer served not being a resident of that county.

WARD, J., dissented.

APPEAL by the defendant, Genesee Valley Blue Stone Company, from a judgment of the Municipal Court of the city of Buffalo in favor of the plaintiff for \$233.59 damages and costs, entered in the office of the clerk of said court on the 23d day of November, 1896, upon the decision of the court rendered after a trial.

Carleton H. White, for the appellant.

John W. Ingram, for the respondent.

FOLLETT, J.:

The action is to recover the price of goods alleged to have been sold and delivered. The sole question involved is whether the court had jurisdiction of the defendant.

This action was begun by a summons issued and personally served on the president of the defendant in the city of Buffalo November 10, 1896, and returnable November 17, 1896. Upon the return day the defendant appeared specially and objected to the jurisdiction of the court, which objection was overruled; then it demurred on the ground that it appeared on the face of the complaint that the court had no jurisdiction of the defendant, which was overruled, and it thereupon answered, alleging that neither of the parties was a resident of or had its principal place of business in the city of Buffalo, and that the court had no jurisdiction of the defendant. The Municipal Court of Buffalo has the same jurisdiction over persons and corporations as Justices' Courts of towns, and no other. (§ 456, tit. 22, chap. 105, Laws of 1891, as amended by chap. 691, Laws of 1894, Charter and Ord. of Buffalo, 272.) It was alleged in the complaint that the litigants were domestic corporations, which

are those organized under the laws of this State or under the laws of the United States. (Code Civ. Proc. § 3343, subd. 18; subd. 5, § 3, chap. 687, Laws of 1892; 2 R. S. [9th ed.] 974.) These allegations, not being denied in the answer, must be taken as true. (Code Civ. Proc. §§ 522, 1776.) The defendant is a resident of the county of Wyoming and has no place of business in the county of Erie. This fact was proved and not disputed on the trial. The plaintiff is a resident "of New York," having branches at Buffalo and in other cities. Schedule A, which is annexed to and forms part of the complaint, so states. This schedule was proved by plaintiff's witnesses. There is no evidence in the record which would justify a court in holding that either litigant was a resident of or had its principal place of business in the county of Erie.

"The term, office of a corporation, means its principal office within the State, or principal place of business within the State, if it has no principal office therein." (Subd. 9, § 3, chap. 687, Laws of 1892; 2 R. S. [9th ed.] 975.)

It would have been well if the certificates of incorporation had been introduced in evidence for the purpose of establishing where the principal offices of the litigants were situated (*People ex rel. Knickerbocker Press v. Barker*, 87 Hun, 341; *affd.*, 147 N. Y. 715), but the fact of their non-residence in the county of Erie was sufficiently proved by other evidence.

A Justice's Court of a town, under the facts proved and not disputed, would not have had jurisdiction of the defendant. (Code Civ. Proc. § 2869.)

A corporation is not a resident of nor has it its principal office or place of business within, nor is it within, every county of the State in which one of its executive officers resides or happens to travel. (*Perry v. The Round Lake Camp Meeting Association*, 22 Hun, 293; Code Civ. Proc. § 341.) Neither party to the action being a resident of, or having its principal place of business in, and not being in the county of Erie when this action was begun, and the officer served not being a resident of that county, the Municipal Court acquired no jurisdiction of the defendant.

The judgment should be reversed, with costs.

All concurred, except WARD, J., dissenting.

Judgment of the Municipal Court of Buffalo reversed, with costs.

WILSON D. OVIATT, Plaintiff, v. JOHN H. HOPKINS, as Trustee under the Will of ROSILLA D. OVIATT, Deceased, Defendant.

An express trust — a conveyance by the remainderman to the life beneficiary does not terminate it.

The trust created by a devise of land to a trustee to receive the rents and profits of the same and pay said rents and profits over to or for the benefit of Wilson D. Oviatt for and during the term of his natural life, and at his death to sell said premises and convert the same into money and pay the same over to Percy D. Oviatt at the time he shall arrive at the age of twenty-one years, or authorizing said trustee to convey said premises to him at his discretion, as to which will be the best for said Percy, is not terminated by a conveyance by Percy D. Oviatt on his arrival at the age of twenty-one years to Wilson D. Oviatt of all his interest in the premises and a release by Wilson D. Oviatt to the trustee.

The validity of chapter 452 of the Laws of 1893 and chapter 547 of the Laws of 1896, section 83, so far as they assume to furnish a means by which a beneficiary can alienate his trust interest and thus terminate the trust without the consent of the trustee, considered.

SUBMISSION of a controversy upon an agreed statement of facts, pursuant to section 1279 of the Code of Civil Procedure.

Sol Wile, for the plaintiff.

John H. Hopkins, defendant, in person.

ADAMS, J. :

The conceded facts of this case are that :

“Rosilla D. Oviatt died on the 10th day of January, 1884, at Rochester, N. Y., seized of the fee of all that tract or parcel of land situate in the city of Rochester aforesaid, and being lot No. Five (5) of the Ely Platt, and described in her last will and testament as store and building known as ‘38 South St. Paul street.’

“She left a last will and testament dated 11 July, 1883, which was admitted to probate by the surrogate of Monroe county on the 24th day of March, 1884; and upon that day John H. Hopkins was duly appointed executor of and trustee under said will; and he having duly qualified, letters testamentary were issued to him by said surrogate upon said 24th day of March, 1884.

“That, among other things, the testator devised the real estate

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afore-described to said John H. Hopkins in trust 'To receive the rents and profits of the same, and pay said rents and profits over to or for the benefit of Wilson D. Oviatt, son of testator,' above-named plaintiff, 'for and during the term of his natural life, and at his death testator directs and empowers said Trustee to sell said premises and convert the same into money, and pay the same over to Percy D. Oviatt, the child of Wilson D. Oviatt, at the time he shall arrive at the age of twenty-one years, or said Trustee may convey said premises to him at his discretion, as to which will be the best for said Percy.

"That, on the 30th day of April, 1897, Percy D. Oviatt aforesaid arrived at the age of twenty-one years.

"That, on the 6th day of May, 1897, said Percy D. Oviatt, by a Deed dated that day, sold and conveyed all his interest in said premises under the Will of Rosilla D. Oviatt, deceased, to his father, the said Wilson D. Oviatt.

"Wilson D. Oviatt has released the said John H. Hopkins from any and every claim which he might have against the said John H. Hopkins, as Trustee, on account of any provision contained in the will of Rosilla D. Oviatt, deceased."

And upon these facts the question to be determined by this court is: Has the trust estate created by the will of Mrs. Oviatt ceased, in accordance with section 83 of chapter 46 of the general laws, and section 63 of article 2, title 2, chapter 1, part 2 of the Revised Statutes, as amended by chapter 452 of the Laws of 1893?

It is expressly declared by section 80 of what is known as the "Real Property Law," being chapter 547 of the Laws of 1896, that an express trust shall vest the legal estate in the trustees, *subject only to the execution of the trust*, and that the beneficiary shall not take any legal estate or interest in the property, but may enforce the performance of the trust. This declaration, however, was no innovation upon existing statutes, for it was simply a re-enactment of a provision of the Law of Uses and Trusts. (4 R. S. [8th ed.] 2438, § 60.)

It must be conceded, therefore, at the very threshold of our inquiry that the defendant, as trustee under the will of Mrs. Oviatt, when he entered upon the execution of his trust, became invested

with the legal title to the trust estate, and that, so long as the trust thus created continued, the beneficiary's interest therein did not extend beyond the right to enforce the execution of the trust. This being so, the real question to be considered is: How can such a trust be terminated?

We think that, prior to the attempted modification of the rule by legislative enactment, to which reference will be made later on, this question might have been answered in a general way by saying that an express trust could not be terminated or dissolved until the expiration of the time, or the fulfillment of the purpose, for which it was created. (1 R. S. 730, § 67; *Watkins v. Reynolds*, 123 N. Y. 211.)

The rule as thus stated is, nevertheless, like most other rules of law, subject to exceptions, as where unforeseen exigencies arise which render the execution of a trust impossible or impracticable; in which case a court of equity doubtless might decree a dissolution. But save in rare instances the courts have been exceedingly careful to assert only a supervisory power over, and to protect rather than destroy, trust estates.

It seems, however, that in 1893, and again in 1896, the Legislature, while still asserting that the legal estate of an express trust vested in the trustee, and in him only, assumed to furnish a means by which the beneficiary could alienate his trust interest and thus terminate the trust without the consent of the trustee. (Laws of 1893, chap. 452; Laws of 1896, chap. 547, § 83.) This legislation, it seems to us, comes dangerously near the violation of the fundamental law of the State. For if, as in this case, the legal estate in the trust property vests in the trustee, it thereby becomes property in his hands, and it is difficult to see how it is within the province of either courts or Legislature to deprive him of that property without due process of law. (Const. art. 1, § 6.)

In a recent decision by the Court of Appeals the right of the courts to interfere with such interests is denied in this emphatic language: "We know of no power possessed by any court to compel a trustee to consent to a destruction of the trust. * * * By the 60th section of the Law of Uses and Trusts (4 R. S. [8th ed.] 2438) the whole estate in the lands embraced in the trust provisions of the will is for the time being vested in the trustee, both in law and

in equity, subject only to the execution of the trust. A judgment of the court which compels him to part with his title to this property without a trial, without the submission of competent proofs, and without the application of the well-established principles of law regulating the determination of such questions, is in direct violation of the fundamental law of the State and of society." (*Cuthbert v. Chauvet*, 136 N. Y. 326-328.)

And if the courts are unable to decree a destruction of a trust in opposition to the wishes of the trustees without doing violence to the Constitution, we fail to discover how the edict of the Legislature, even when clothed with all the formalities of deliberate enactment, and expressed in the faultless idiom which characterizes the amendment of 1893, can accomplish that object without encountering the same insuperable obstacle. (*Powers v. Bergen*, 6 N. Y. 358; *Brevoort v. Grace*, 53 id. 245; *People v. Powers*, 147 id. 104-109.)

It follows, therefore, that our conclusion upon the question submitted to us is, that the trust estate created by the will of Mrs. Oviatt was not destroyed by reason of the facts stated in the submission; that the same still exists, and that the defendant is entitled to enter a judgment to that effect, and also for the costs of this action.

Judgment ordered accordingly.

All concurred, except FOLLETT, J., not sitting.

Judgment ordered for the defendant, with costs.

PATRICK CUNNINGHAM, Appellant, v. THE SYRACUSE IMPROVEMENT COMPANY, Respondent.

Negligence—a teamster, while rendering, by direction of his master, services to a third person, injured by the negligence of the latter's servant—no action lies against the third person—fellow-servants.

A teamster in the general employment of A. was directed by A. to perform such work as might be required of him by B., by whose foreman he was specifically instructed as to the manner in which he was to load stone upon his wagon

from a boat. While employed in so doing he was struck by a stone and injured through the negligence of a servant of B. engaged in the work of loading the stone upon the wagon.

In an action brought by the teamster against B. to recover for the injury thus received, it was held that B. was the master of the teamster and also of the servant through whose negligence he was injured, they being co-servants in the same common employment, and that, therefore, the action could not be maintained.

APPEAL by the plaintiff, Patrick Cunningham, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Onondaga on the 17th day of February, 1897, upon the dismissal of his complaint by direction of the court after a trial at the Onondaga Trial Term.

The plaintiff was a teamster in the employ and pay of one John W. Gee. On the 13th of August, 1895, Gee agreed with the defendant to furnish it a team, wagon and man to haul stone, for three dollars and fifty cents per day, and he thereupon directed plaintiff to take a team and perform whatever work was required of him by the defendant.

In obedience to these instructions the plaintiff, on the following morning, went with his team to the canal, near what is known as the "wide waters," in the city of Syracuse, at which place a boat loaded with stone was moored to the bank.

He reached the canal at about half-past six o'clock, and waited "until the boss and his man came." At seven o'clock the "boss" stationed his men, called to the plaintiff to drive forward, told him where to place his wagon, and directed him to help load stone thereon. He also instructed him as to the number of stones to draw at a time, and as to the proper method of placing them on his wagon. The plaintiff followed the instructions thus given and proceeded to load his wagon.

The stones were swung from the boat on to the wagon by means of a derrick, and, while the plaintiff was occupied in placing them in proper position, one of the defendant's servants negligently permitted a large stone to be swung toward the wagon without any warning to the plaintiff, in consequence of which the latter was hit and quite severely injured. It is to recover damages for the injury thus received that this action is sought to be maintained.

Walter N. Magee for the appellant.

W. S. Andrews, for the respondent.

ADAMS, J. :

At the close of the plaintiff's evidence a nonsuit was directed by the learned trial court, upon the ground that the injury of which the plaintiff complains was inflicted by the negligence of a fellow-servant, and the determination thus reached presents the sole question which this court is called upon to review.

It is, of course, not to be denied that at the time of the accident the plaintiff and the person whose negligence caused his injury were engaged in a common occupation. But it is insisted, nevertheless, that they were in no legal sense co-servants, for the reason that they were not in the employ of the same master. And if this contention is well founded, it is needless to say that the direction which was given to the case at the trial was unwarranted. For it must be assumed for the purpose of this review that the person in charge of the derrick was negligent, and as the relation of master and servant existed between him and the defendant, it necessarily follows that the latter was liable for the negligence of the former, unless he and the plaintiff were fellow-servants.

It must be our endeavor, therefore, to determine whether the position assumed by the defendant is tenable in the face of the undisputed facts of the case; and in making this attempt it is of primary importance to find some test by which the plaintiff's relation to the defendant can be definitely ascertained.

It is well settled that, in order to establish the relation of master and servant, it is necessary that the employer shall not only select the workman, but that he shall also possess the right to direct him in the performance of his work as well as to discharge him for incompetency or misconduct. (*Butler v. Townsend*, 126 N. Y. 105-108.)

When the relation is thus established the doctrine of *respondet superior* applies, as between the master and third parties. And this doctrine is founded upon the power which the master has the right, and is bound to, exercise over the acts of his subordinates for the prevention of accidents. (*Blake v. Ferris*, 5 N. Y. 48-53.)

We think it is quite apparent, therefore, that the real test of relationship is, *first*, employment; and, *second*, power and control over the person employed. Or, as it has been tersely stated by a text writer of recognized ability: "In all such cases the question is whether *at the time of the injury* the servant was subject to the master's control." (Wood on Mast. & Serv. § 424.)

Subjecting then the facts of the case in hand to an application of this test, we find that the element of power or control is pretty conclusively established; for it is undisputed that the plaintiff, while engaged in drawing stone for the defendant, was under the absolute control of the latter; that he received directions from the defendant's foreman as to where he should station his wagon while it was being loaded, as to the manner of loading the stone and where to unload the same, and that he obeyed these instructions. In all these respects, therefore, he occupied precisely the same relation towards the defendant as did the other workmen who were associated with him. But it is urged that there is still lacking the element of employment which is essential to the creation of the relation of master and servant, and in one sense this contention is true. For unquestionably at the time of the accident Cunningham was, generally speaking, in the employ of Gee, and was working only temporarily for the defendant by permission of his general employer. But did this circumstance affect Cunningham's relation towards his fellow-laborers? that is, as to them, did it constitute him a stranger instead of a co-servant?

In order to obtain a satisfactory solution of this question, it must be borne in mind that the principle invoked by the defendant, and which has thus far been applied to this case, is one which has secured recognition in this country for more than half a century. (*Murray v. R. R. Co.*, 1 McMull. [S. C.] 385; *Farwell v. Boston & Worcester R. R. Co.*, 4 Metc. [Mass.] 49.)

Briefly stated, this principle is, that when a person accepts employment in a business in which others are engaged with him, there is an implied agreement upon his part to assume all the ordinary risks attending such business, including accidents which result from the carelessness of his co-employees; and the foundation upon which it rests is unity of service and control.

In a case, therefore, where unity of service and control is found

to exist, the natural deduction would appear to be that, if a person is injured by the carelessness of another, and at the time of the accident they are both subject to the orders and control of a common master, they are co-servants as to the particular employment in which they are engaged, although one of them may at the same time happen to be in the general service of a third party; or, to state the proposition more concisely, a person who is temporarily employed while in the general service of another, must be treated as to that particular employment as the servant of the person thus employing him; and the person who has the right to direct and control his conduct in that particular business must, likewise, be regarded as his master, for it is quite clear that the existence of the general relation of master and servant does not exclude a like relation between the servant and a third party to the extent of the special service in which the servant may be actually engaged.

The rule as thus stated has long been recognized and adopted in Massachusetts. In the case of *Kimball v. Cushman* (103 Mass. 194) it was deemed applicable as to liability to a stranger for the negligence of one employed in a special service; and in the more recent cases of *Johnson v. City of Boston* (118 Mass. 114); *Hasty v. Sears* (157 id. 123); *Morgan v. Smith* (159 id. 570), and *Coughlan v. Cambridge* (166 id. 268), it was applied where, as in the present case, the general employer had temporarily loaned his servant to another for some particular purpose.

In this State the decisions upon this question appear to be somewhat conflicting. In a comparatively early case it was held by the General Term of the fourth department, that where a servant was loaned by his general employer to a third party for some special service, and, while engaged in the performance thereof, carelessly drove into and injured the wagon of a stranger, the general and not the special employer was liable. (*Michael v. Stanton*, 3 Hun, 462.) And in the more recent case of *Murray v. Dwight* (15 App. Div. 241; 44 N. Y. Supp. 234) the Appellate Division in the third department, in reviewing some of the authorities to which we have adverted, as well as several leading English cases involving the same question, lays much stress upon the fact that in the case which it was considering, a horse was loaned by the general employer with his servant, and seems to regard this fact as calling for the applica-

tion of a different rule from the one which would obtain if the servant had only been loaned. Why this should be so, especially in a case where the servant and not a stranger is the party injured, we must confess our inability to understand. But, as the decision in the case last cited appears to rest mainly upon the fact that the accident to which the plaintiff attributed his injury did not occur during the course of his actual employment, what is said in the prevailing opinion as regards the question here under consideration may perhaps be treated as *obiter*.

But however this may be, we think that the Court of Appeals, in at least two instances, has very clearly indicated the rule which should govern in cases of this character. (*Wyllie v. Palmer*, 137 N. Y. 248; *McInerney v. D. & H. C. Co.*, 151 id. 411.)

In the case first cited the defendant sold a quantity of fireworks to a committee of the citizens of the city of Auburn, and at the time fixed upon for their exhibition sent a man and a boy to Auburn to assist the committee in managing the display. The expenses of these two persons were paid by the committee, under whose direction and control they acted while in Auburn. A rocket which was discharged by the boy struck and injured one of the plaintiffs, and, in an action against the general employer to recover damages for such injury, it was held that "the fact that the party to whose wrongful or negligent act an injury may be traced was at the time in the general employment and pay of another person does not necessarily make the latter the master and responsible for his acts. *The master is the person in whose business he is engaged at the time and who has the right to control and direct his conduct.*"

When we come to apply the rule as it is thus stated to the present case, we are unable to see why it does not necessarily dispose of the question we have been considering. For, as has already been stated, the plaintiff at the time he received his injury was engaged in performing services for the defendant, who had the right and did actually assume to control his conduct. For any misconduct or inability to perform the service required of him, the defendant could undoubtedly have discharged him and returned him to his general employer. The defendant was, therefore, at that time the plaintiff's master, and, as he was also the master of the person whose negligence caused the injury, it follows that this person and

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the plaintiff were co-servants in the same common employment, and that no action lies against the defendant for the injury sustained by the plaintiff. (*Rozelle v. Rose*, 3 App. Div. 132.) The judgment appealed from should, therefore, be affirmed.

All concurred.

Judgment and order affirmed, with costs.

BENJAMIN F. HAZLETON, Appellant, v. ELLIS WEBSTER and Others,
Respondents.

Action to restrain ice cutting injurious to a mill property upon the outlet of a lake — title of riparian owners upon a non-navigable lake — acts of parties giving a practical construction to an agreement — consideration therefor — reasonable use of the waters of a lake in cutting ice from it — estoppel.

The owners of a mill lot, situated upon the outlet of an inland, non-navigable lake, not being themselves riparian owners, obtained from the riparian owners of lands upon such lake grants which permitted the mill lot owners, who had raised the height of their dam upon the outlet, to flow thereby so much of the lots of the riparian owners "as is now flowed by said dam and to keep the same so flowed" as long as the water is used to propel machinery.

A subsequent grantee of the mill lot, finding his supply of water reduced by reason of the ice cut by certain riparian owners upon the lake, brought an action to prevent their continuing to cut the ice, and thereafter, in a settlement of such action, entered into an agreement with them by which he, for a sum to be paid him for each ton of ice cut, conveyed to them a strip of land which adjoined their property and also granted to them the right to cut, and released them from any damages arising from their cutting, the ice from the lake, and thereafter such riparian owners, with the apparent acquiescence of the owner of the mill lot, cut and removed ice from the lake without any restriction as to quantity.

Held, that the agreement was a grant and not a mere license;

That a subsequent grantee of the mill lot could not maintain an equitable action to restrain these riparian owners from cutting the ice.

Quære, whether the fact that the agreement provided that it should not "be deemed to grant the exclusive right" to the persons thus cutting ice "to cut, take and remove ice from said lake," and that it should not affect the right of the owner of the mill lot to claim damages against any other parties, operated as a limitation upon the estate granted.

That even were there doubt as to the meaning of the agreement, the acts of the parties gave it a practical construction;

That, moreover, the grantor of the mill lot not being a riparian owner upon the lake, had no right to the ice in it, it being the case of an inland and non-navigable body of water as to which the law presumes that a riparian owner owns to the center;

That the agreement being under seal, a presumption of a consideration arose therefrom, and the further fact that it bore unmistakable evidence of mutuality, and that the instrument was executed in settlement of a disputed claim, also afforded an adequate consideration;

That the riparian owners upon this inland, non-navigable lake had the right to use its water and cut its ice, but that such use must be reasonable, and must not damage the mill owner located upon the outlet of the lake;

That by entering into the agreement and thus compromising their differences with the mill owner, the riparian owners simply admitted that by taking the quantities of ice from the pond which they did, they were making such an unreasonable use or appropriation of its waters as rendered it desirable for them to buy their peace, and that the agreement was not such a recognition of the mill owner's right to the ice as estopped them from disputing his title thereto.

APPEAL by the plaintiff, Benjamin F. Hazleton, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of Cattaraugus on the 10th day of July, 1896, upon the decision of the court, rendered after a trial at the Cattaraugus Special Term, dismissing his complaint upon the merits.

The controversy involved in this action arises out of conflicting claims to the ice forming upon a small body of water in Cattaraugus county commonly known as "Lime lake."

This lake covers an area of about 135 acres. It is fed by subterranean springs; is without current and non-navigable; but its waters are especially pure and for that reason the ice which they produce is exceedingly valuable and finds a ready market. Prior to 1831 a sawmill was erected and a dam constructed upon what is known as the "mill lot," which contains about three acres of land. This lot, which is now owned by the plaintiff, is located upon the outlet near the north end of the lake, and was originally owned by the Holland Land Company, that company being the common source of title of all the lands covered by, and adjacent to, Lime lake.

In the year 1831 the mill dam was washed away, in consequence of which the waters of the lake receded to such an extent that they covered only about one-third of the present area. The following year Bela H. Colgrove and Nathan Follett, who were then in pos-

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session of the mill lot and adjoining premises, rebuilt the dam, increasing its height two feet above that of the original structure, the effect of which was to raise the water in the lake about eleven feet.

Thereafter, and on the 24th day of December, 1834, the Holland Land Company, by an ordinary warranty deed, conveyed a tract of about thirty-three acres of land to Bela H. Colgrove, and this tract included the mill lot and the building and dam located thereon, but it did not include, nor did the deed pretend to convey, any portion of the bed of the lake or of the waters thereof.

The plaintiff through mesne conveyances finally acquired title to the mill lot and several other small parcels of land adjacent thereto, amounting in all to some seven or eight acres, his immediate predecessor in title being John E. Euchner, who had previously acquired the privilege of flowing the lands adjoining the lake under certain grants executed by the respective riparian owners to Colgrove and Follett.

The defendants Webster, Germann and Banks were originally copartners in the business of cutting ice from Lime lake and selling the same in considerable quantities to their customers. In order to carry on this business they became the purchasers of nearly all the lands adjoining Lime lake on its easterly shore, and upon these premises they erected one or more ice houses and such other appurtenances as were necessary for harvesting and storing ice.

In 1890 John E. Euchner brought an action to restrain the defendants above named from removing ice from the lake. This action, however, was thereafter compromised and settled, and as a result of that settlement the parties thereto, together with Mrs. Euchner, entered into the following written agreement which they executed under their respective hands and seals, viz. :

"ARTICLES OF AGREEMENT, Made and entered into this 29th day of October, 1890, by and between John E. Euchner and Grace W., his wife, of the town of Machias, in the county of Cattaraugus and State of New York, of the first part, and Ellis Webster, Edward H. Webster, William Germann and Levi P. Banks, as and composing the firm of 'E. Webster, Son & Co.,' of the city of Buffalo, county of Erie, State of New York, of the second part,
Witnesseth :

“For and in consideration of the covenants and agreements hereinafter contained, the said John E. Euchner hereby covenants and agrees to sell and convey, and does hereby grant, release and convey, unto the parties of the second part all of his right, title and interest to and in the strip of land lying and situate on the easterly side of Lime lake, in the town of Machias, aforesaid, and which is adjacent on the west to the farm owned by the parties of the second part herein, and also to permit, grant, release, transfer and assign to them, the said parties of the second part, the unrestricted right, privilege and permission to cut, take and remove from said lake at any time the ice forming thereon; so far as he is the owner and vested with any title to such ice or right to cut and remove the same, and releases to the said parties of the second part hereto any damages that he has sustained or may hereafter sustain by reason of diminishing the water supply for his mill at the outlet of said lake, and further covenants and agrees to maintain the dam on his premises at said outlet and which causes the water, in a measure, to accumulate, thus increasing the quantity of water therein, and also agrees not to lower the mill race from said lake, or reduce the head of said water more than two feet below what it has been maintained and kept up since his ownership thereof, and the said Grace W. Euchner joins in the execution of this instrument for the purpose of releasing and relinquishing to the parties of the second part her inchoate dower interest in said lands and premises, and does as part consideration hereof release and relinquish such dower interest therein, and the said parties of the first part further agree that, in furtherance of this agreement, and if requested by the parties of the second part to make the title and rights of the parties of the second part more effectual and secure, will at any time execute a deed of conveyance conformably to this contract conveying to them, the said parties of the second part or their assigns, the said lands and rights in said ice as aforesaid so far as the said John E. Euchner has the title and right to convey the same.

“In consideration whereof, the parties of the second part hereby covenant and agree to and with the said John E. Euchner, his heirs, executors and assigns, to pay him one-half cent for each ton of ice hereafter taken by them from said lake. For the purpose of ascertaining and determining the quantities of ice so taken from time to

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time, the weights of railroad company or companies at Machias, over whose tracks said ice is shipped, are to be accepted and received by the parties hereto as the exact amounts so taken. Said ice to be paid for, on such statements, at the said rate of one-half cent per ton annually on the first day of January hereafter. Each of said payments is to cover and include the entire shipments of ice for the year immediately preceding such payment. The parties of the second part further agree, as part consideration hereof, that they will, within thirty days from the date hereof, furnish to said Euchner an accurate statement of all the ice shipped by them from said lake since January 1st, 1889, and pay him therefor at the rate aforesaid within said thirty days. This agreement is to bind the heirs, executors, administrators and assigns of all the parties hereto.

"It is understood and agreed between the parties hereto that nothing herein contained shall be deemed to grant the exclusive right to the parties of the second part to cut, take and remove ice from said lake, nor shall anything herein contained in any way affect any claims or damages which the parties of the first part may have at any time against any persons other than the parties of the second part.

"It is further understood and agreed that the grant herein contained of the strip of land above mentioned shall not in any manner affect the existing right of flowage which the parties of the first part have, and that the deed above provided for shall contain a proper clause, reserving such right of flowage to the parties of the first part.

"*In witness whereof*, the parties have hereunto set their hands and seals the day and year above written."

This instrument was duly acknowledged by the several parties thereto, and was subsequently recorded in the clerk's office of Cattaraugus county.

Thereafter the defendant "E. Webster, Son & Co." was duly organized as a corporation under the laws of this State, and, as such, succeeded to all the right, title and interest which the former firm had acquired in the lands adjoining the lake, as well as in the ice forming thereon.

The company thereupon proceeded to enlarge its plant and increase its facilities for harvesting, storing and selling ice, to such an extent

that the present capacity of the plant is about 150,000 tons per season.

On the 13th of September, 1894, Euchner and wife conveyed the mill lot to the plaintiff, including all the right which they owned, to flow the lands adjoining the lake. But this grant was, by express terms, made subject to the agreement entered into between the grantors and the defendants.

Intermediate the date of the execution of this agreement and the conveyance to the plaintiff, the defendants cut and removed ice from the lake at different times, and in such quantities as they saw fit, without objection or remonstrance from Euchner, although the cutting of ice in such largely increased quantities had a tendency to diminish the supply of water in the lake, and to some extent, at least, to impair the value of the mill property.

Soon after acquiring title, the plaintiff notified the defendants that he claimed the ice upon the lake, and that they must refrain from cutting the same; but as the defendants declined to recognize the validity of the plaintiff's claim, he brought this action to enjoin the defendants from any further interference with his supposed rights.

John Houston Merrill and Edwin E. Tait, for the appellant.

August Becker, for the respondents.

ADAMS, J.:

The facts of this case, which have been necessarily stated with considerable detail, are, in the main, such as were found by the learned trial court. None of them has been excepted to by the plaintiff, and they must consequently, for the purposes of this appeal, be regarded as established. Some additional circumstances were made to appear upon the trial which were probably sufficient to justify the plaintiff in invoking the aid of a court of equity, provided he can maintain his contention that the defendants, in cutting and removing the ice from Lime lake, were invading his legal rights, and were, in fact, trespassers.

Proceeding, therefore, to a consideration of the case from a legal point of view, we discover that the plaintiff rests his contention upon the following propositions, viz.:

(1) That he acquired an absolute and unqualified right of ownership in the ice forming in the lake through the purchase, by his predecessors, of the right to flow the lands of the riparian owners; (2) that the agreement of October 29, 1890, was void, because wholly without consideration, and (3) that by accepting and acting under the right or license granted under this agreement, the defendants were estopped from denying the plaintiff's title to the ice.

As introductory to the examination of these propositions it may be profitable to determine what would be the relative interests of these parties in the subject-matter of the action, if the same were in no wise affected by the respective grants under which each claims the exclusive right to the ice.

To accomplish this it seems only necessary to refer to the fact that the defendants are riparian owners while the plaintiff is not, in consequence of which, Lime lake being an inland and non-navigable body of water, the presumption arises that, unless restricted by some reservation in their deed, the defendants' title extends to the center of the lake. (*Smith v. City of Rochester*, 92 N. Y. 463; *Gouverneur v. The National Ice Co.*, 134 id. 355; *Deuterman v. Gainsborg*, 9 App. Div. 151; *City of Syracuse v. Stacey*, 86 Hun, 441.)

It was not made to appear at the trial, nor do we understand it to be now claimed, that the defendants are in anywise embarrassed by restrictions of the character adverted to, but to repel the presumption existing in their favor, the plaintiff relies mainly, if not entirely, upon the grants which his predecessors in title, Colgrove and Follett, obtained from the riparian owners to flow their lands. These grants were executed by different parties and at different times, but in their language they are nearly identical, and there is no difference whatever in their legal import. In short, they convey "all the right and privilege of flowing by means of a dam erected at or on the outlet of Lime Lake, so much of lot No.— * * * as is now flowed by said dam, and to keep the same so flowed as long as the water raised by and drawn from said dam is used for the purpose of propelling machinery."

It is apparent from the language here quoted that the mill owners, in order to propel the machinery of their mill, found it necessary to increase their water power. This could be done only by raising the dam; and the addition of two feet to the height of the dam, of

course, raised the water correspondingly in the lake and caused it to overflow the lands of the adjoining owners. It was consequently to provide against this contingency, and to protect the mill owners in the enjoyment of their increased facilities, that grants were obtained from the riparian owners of the right to maintain the dam at its increased height, and to flood the lands of the latter as long as the water raised by and drawn from the dam should be used for the purpose of propelling the machinery of the mill.

But we fail to see wherein these grants diminished or in any manner affected the rights of the riparian owners in the waters of the lake, or in the ice which formed upon its surface. For while, strictly speaking, it cannot be said that they ever had any property in the waters themselves (*Matter of Thompson*, 85 Hun, 438), their title, nevertheless, covered the bed of the lake, and they consequently had the undoubted right to use the waters thereof and to cut and remove the ice formed thereon, provided this right was exercised reasonably and in such a manner as not to materially diminish the volume of water in the lake to the injury of lower proprietors. (*Marshall v. Peters*, 12 How. Pr. 218; *Dodge v. Berry*, 26 Hun, 246; *De Baun v. Bean*, 29 id. 236; *Cummings v. Barrett*, 10 Cush. 186; *Bigelow v. Shaw*, 65 Mich. 344.)

It follows, of course, that if the riparian owners conveyed no other or greater right than the mere privilege of flowing their lands, the mill owner obtained no better proprietary interest in the waters of the lake than he enjoyed previous to the execution of the grant, which, as we have seen, was limited to their use for mill purposes, subject to a prior, reasonable use thereof by the riparian owners.

The record before us seems to make it quite obvious, however, that the defendants, while carrying on the ice business as a firm, took such quantities of ice from the lake as to give rise to the complaint that their use of its waters was unreasonable, in consequence of which an action was brought against them by Euchner, who was then the owner of the mill lot, and it was to compromise and settle this action that the agreement of October 29, 1890, was entered into.

We are thus brought to a consideration of the effect of this instrument upon the rights of the respective parties; and in this connection it is to be observed that, as the plaintiff purchased his property

in subjection to whatever rights his grantor had parted with, he occupies precisely the same attitude towards these defendants as would Euchner, if he were still the owner of the property.

An examination of the agreement referred to will disclose the fact that it was evidently designed to accomplish the following objects: (1) To convey to the defendants a small strip of land therein mentioned; (2) to grant to them the unrestricted right, privilege and permission to cut and remove ice from the lake; (3) to release them from all damages which had accrued or which might thereafter be sustained by reason of any interference by them with the water flowing on to the mill lot, and (4) to reserve to the grantors of these rights and privileges compensation therefor upon the basis of one-half cent for each ton of ice cut and removed.

This agreement appears to have been duly executed. Its language is neither vague nor ambiguous, and we see no reason to doubt its efficiency for the purpose for which it was designed, namely: To confer upon the defendants the right, which they did not theretofore possess, of cutting and removing ice from Lime lake in unlimited quantities, even if in so doing they injured or absolutely destroyed their grantors' mill privilege. Nor is the instrument to be regarded as a mere license. On the contrary, it is in effect what we have repeatedly termed it, a grant, and the mill owner's rights in the waters of the lake, whatever they may have been, were distinct and substantive subjects of a grant. (Goold on Waters, § 304; *Hall v. Sterling I. & R. Co.*, 148 N. Y. 432.)

It is contended, however, that the clause in this agreement which provides that nothing therein contained shall be deemed to grant the *exclusive right to the defendants* to cut and remove ice from the lake must be regarded as a limitation upon the estate granted, and an elaborate argument is entered upon to sustain this contention upon the one hand, while upon the other it is insisted with no little ingenuity and a quite liberal citation of authority that the clause referred to should be treated as the *habendum*, and that, consequently, within well-settled rules of construction, it must yield to the granting clause.

In the view which we take of the case this question, however interesting its examination might prove, is really of little or no

importance. For, as we have seen, the plaintiff has no interest in the *corpus* of the ice, and as to these defendants, he no longer has any interest in the quantity taken by them. It, therefore, does not concern him whether the defendants claim an exclusive or an unrestricted right to the ice. It rather concerns the other riparian owners, who, so far as appears, do not dispute the defendants' claim, whatever it may be.

But even if we entertain any doubt as to the correctness of the views we have expressed respecting the relative rights of the parties under this instrument, that doubt would be resolved by the fact that the instrument has received a practical construction at the hands of the parties themselves. For it is not denied that, after obtaining this grant, the defendants proceeded to cut and remove ice without the slightest restriction as to quantity; and this, it seems, was done with the apparent acquiescence of their grantor Euchner.

This certainly shows the understanding which the parties entertained respecting the terms of the agreement and it should relieve that instrument of whatever uncertainty it may possess. (*Dodge v. Zimmer*, 110 N. Y. 43; *Woolsey v. Funke*, 121 id. 87; *McClanathan v. Friedel*, 85 Hun, 175.)

With the principal question in the case thus disposed of, it becomes necessary to determine what virtue there is in the plaintiff's remaining propositions.

We must confess our inability to perceive upon what theory it is urged that the agreement which we have had under consideration is void for want of consideration, for it is conceded that it was under seal; and this of itself was, at common law, conclusive evidence of a sufficient consideration, although under our present system it simply raises a presumption of that fact. (*Torry v. Black*, 58 N. Y. 190; Code Civ. Proc. § 840.) But in addition to the presumption thus created, the instrument, upon its face, bears unmistakable evidence of mutuality, and it expressly recites that, in consideration of the rights and privileges thereby granted to the defendants, they will pay to their grantor Euchner, his heirs, executors and assigns, one-half cent for each ton of ice thereafter taken by them from the lake. This covenant it appears that the defendants fulfilled, for Euchner testifies that they paid him from \$100 to \$135 per season under this contract.

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It would seem, therefore, that not only was there a consideration for the grant, but that the same was adequate and satisfactory to the plaintiff's grantor.

Moreover the instrument was executed in settlement of a disputed claim, and this fact alone would furnish sufficient evidence of a consideration to uphold it. (*Seaman v. Seaman*, 12 Wend. 381; *Feeter v. Weber*, 78 N. Y. 334; *Rector, etc., v. Teed*, 120 id. 583.)

The plaintiff's last contention is that the execution and acceptance of the agreement of October 29, 1890, was a recognition by the defendants of Euchner's right to the ice, which estops them from now disputing the plaintiff's claim of title thereto. We do not so regard it. It is true that by this instrument the grantor released to the defendants whatever right, title or interest he had in and to the ice in the lake, but, manifestly, its main purpose was to furnish him adequate compensation for the damage which he had already sustained, or which might thereafter result from diminishing the amount of water to which he was entitled for milling purposes. This right, as we have attempted to show, was one which the riparian owners could not interfere with by an unreasonable use of the water in the lake; and by entering into the agreement and thus compromising their differences, the defendants, in our view of the matter, simply admitted that, by taking the quantities of ice from the lake which they did, they were making such an unreasonable use or appropriation of its waters as rendered it desirable for them to buy their peace.

Upon a careful review of the entire case, we are persuaded that a proper disposition was made of it at the trial, and that the judgment appealed from should, therefore, be affirmed.

All concurred, except FOLLETT, J., not sitting.

Judgment affirmed, with costs.

CALVIN L. STOWELL, Respondent, v. THE GREENWICH INSURANCE
COMPANY of the City of New York, Appellant.

Independent collateral oral agreement between an insurance company and its general agent — it may be proved although the contract of agency is in writing — interference with the sub-agents and the business of the general agent, when the agency ends — damages may be recovered although difficult of ascertainment and speculative.

A written agreement was made between an insurance company and a party about to act as its general agent in work requiring the appointment by him of sub-agents, which provided, among other things, "that this contract may be terminated at any time by either party giving ninety (90) days' notice thereof, and without any liability on the part of the said Company beyond the commission aforesaid actually earned" at the closing up of said agency; pursuant to which provision the contract was terminated by the company.

It was claimed by the agent that contemporaneously with the execution of the written agreement, he and the company made another agreement, which, although not reduced to writing, was collateral and supplementary to it, and was made as a condition of his acceptance of the written agreement, to the effect that, in case of the written agreement being terminated, the company would not interfere with his sub-agents or business.

When the written contract was terminated by the company it endeavored to retain in its service all the sub-agents appointed by the general agent and to avail itself of the business secured by them.

In an action brought by the agent to recover damages resulting from such breach of the oral agreement,

Held, that the oral agreement was collateral to and independent of the written one and was enforceable.

The fact that damages are difficult of accurate ascertainment, and that a jury must, to some extent, speculate as to their amount, cannot relieve a party in default on his contract from liability thereon.

GREEN, J., dissented.

APPEAL by the defendant, The Greenwich Insurance Company of the city of New York, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Monroe on the 30th day of March, 1896, upon the verdict of a jury, and also from an order entered in said clerk's office on the 22d day of January, 1897, denying the defendant's motion for a new trial made upon the minutes.

William Allen Butler and John Notman, for the appellant.

William Nathaniel Cogswell and William F. Cogswell, for the respondent.

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ADAMS, J. :

The plaintiff, through the medium of this action, seeks to recover damages for an alleged breach of contract.

It is conceded that on or about the 31st of December, 1887, the parties entered into a written agreement, by the terms of which the plaintiff was appointed the general agent of the defendant for certain specified portions of the States of New York and Pennsylvania, with power to appoint sub-agents in the territory assigned to him, subject, however, to the approval of the defendant. The sub-agents thus appointed were to represent the defendant and prosecute the business of fire insurance in its behalf in the several localities where they resided. They were, however, to be under the immediate supervision of the plaintiff, who became personally responsible for the faithful performance of the duties required of them, and who also assumed the entire expense incurred in their appointment, as well as in the inspection of all risks and in other special work required in the prosecution of the business.

It is not denied that this written contract was fully performed by both parties, and it appears to have been terminated on the 1st day of August, 1895, without fault on the part of the defendant, and solely in virtue of a provision contained therein, which accorded to either party the privilege of terminating the contract upon giving to the other ninety days' notice in writing of an intention so to do.

It is contended, however, by the plaintiff that, contemporaneously with the execution of this written contract, an independent and suppletory oral agreement was entered into between him and the defendant, and it is the damages arising from an alleged breach of this agreement that the plaintiff is seeking to recover.

It appears that at one time the plaintiff represented the Clinton Insurance Company, under a contract quite similar in its terms to the written one subsequently entered into between him and the defendant, and it is claimed by the plaintiff that when the Clinton Insurance Company terminated its contract, it reinsured its risks and then attempted to turn over the plaintiff's sub-agents to the reinsuring company, without regard to his interests, in consequence of which he suffered serious loss and injury.

Shortly after encountering this experience, the plaintiff, through the instrumentality of a gentleman by the name of Foote, obtained

an introduction to one Mason A. Stone, who was at that time the secretary, and subsequently the president of the defendant; and thereupon negotiations were entered into with a view of obtaining for the plaintiff an appointment as the general agent of the defendant. Several interviews took place between these parties, in the course of which, as the plaintiff testifies, he informed Col. Stone of the treatment he had received from the Clinton Insurance Company, and a friend of the plaintiff, one Nathaniel Foote, testifies that in an interview between himself and Col. Stone he, in that connection, stated to Col. Stone that if he (Stowell) entered into a similar relation with the defendant he wished it understood that in the event of the agreement being terminated without fault upon his part, the company should not interfere with his agents or business, to which Col. Stone replied: "If we make arrangement, and the business proves profitable and satisfactory, we shall not want to make any change; and if not, if the business is not profitable, we shall not want the business nor the manager, either."

But without entering further into the details of these negotiations, it is sufficient to say that they resulted in the execution of the written contract to which reference has been made, and also, as it is claimed, in the separate oral agreement which lies at the foundation of this action.

It is insisted however—and this is the first question which we are asked to consider upon this review—that the evidence relied upon by the plaintiff is insufficient to establish this latter agreement. This contention, we have no hesitation in saying, does not impress us favorably. For, in addition to the evidence to which we have just alluded, the plaintiff testified that during the first interview with Col. Stone he left his contract with the Jersey City company with him to be copied and made the basis of the contract to be entered into between the defendant and the plaintiff, stating to him, however, in that connection, that "I would sign a contract of that kind, on condition if it was terminated, the agencies and the renewals should be left with me, and he (Stone) said it was satisfactory to him, and I said it was satisfactory to me."

It seems quite evident, therefore, that if this evidence is to be believed, the minds of the parties met in a contract the terms of which were substantially those set out in the complaint, and although the evidence of the plaintiff and of his corroborating witness was

flatly contradicted by Col. Stone, the issue of fact which was thus clearly defined was submitted to the jury by the learned trial justice, and it can hardly be said now that their verdict, which was in favor of the plaintiff, was against the weight of evidence.

Furthermore, it was made to appear most conclusively that, when the written contract was terminated by the defendant, it endeavored to retain in its service all the sub-agents which the plaintiff had appointed, and to avail itself of all the business which they had obtained, and consequently it must be conceded, we think, that if the oral contract was proven its breach was likewise established beyond all controversy.

And with these facts thus established, we are brought to the consideration of the real question in the case, and one which is of sufficient importance to deserve careful and serious examination. We refer, of course, to the validity of the oral agreement set up in the complaint, and to the right of the plaintiff, in the circumstances of this case, to make its breach the basis of a recovery.

This question was raised during the progress of the trial in a variety of ways: First, by objection to the admission of evidence tending to prove the parol agreement, then by motion for a nonsuit when the plaintiff rested his case, and again by a motion for the direction of a verdict at the close of the proofs. And it is almost superfluous to add that its determination requires a review of the rule which excludes parol evidence when the only effect of its admission will be to contradict, conflict with or vary the terms of a written agreement.

This rule is one of long standing. Generally speaking, there is nothing vague or ambiguous about it, and so thoroughly has it been incorporated into the jurisprudence of this State that we are admonished by the court of last resort that it is no longer "a proper subject of discussion." (*Englehorn v. Reitlinger*, 122 N. Y. 76.) But simple and well settled as is this rule, its application is not infrequently attended with some difficulty, in consequence of the many exceptions to its full operation which the proper administration of justice seems to require, and it is only by the aid of the exception which excludes collateral undertakings from the operation of the general rule just stated, if at all, that the plaintiff is able to prove and maintain his cause of action.

If we correctly apprehend the plaintiff's attitude, he does not seek by the terms of an oral agreement to vary or modify in any manner the written contract entered into with the defendant; neither does he claim that the written contract is so vague or incomplete as to require explanation; but he does insist that, contemporaneously with the execution of the written contract, he and the defendant made another agreement, which, although not reduced to writing, was collateral and suppletory to the first; that there was an adequate consideration therefor, and that, consequently, he is entitled to recover any and all damages which he has sustained by reason of its breach by the defendant. The importance of determining the soundness of the plaintiff's position in respect of this question is thus made apparent at a glance, for if this parol contract may be regarded as collateral and suppletory to the written one he is doubtless correct in his conclusion. (*Lewis v. Seabury*, 74 N. Y. 409; *Chapin v. Dobson*, 78 id. 74; *Eighmie v. Taylor*, 98 id. 288; *Dodge v. Zimmer*, 110 id. 43; *Hutzler v. Richter*, 13 App. Div. 592.)

A brief analysis of the case as it is disclosed to us by the record may, therefore, prove the best solvent of the problem with which we are here confronted. Upon the theory that the verdict of the jury represents the actual facts of the case, it may be assumed that an agreement was entered into by these parties, in terms substantially as stated by the plaintiff. It is equally certain that this agreement was supported by a sufficient consideration, for the plaintiff testifies that he signed the written contract upon condition that the defendant would agree, in the event of its termination, not to interfere with his sub-agents. It related to the same subject as the written contract, it is true, but its provisions are not so closely connected with the principal transaction as necessarily to form a part of it, while without it the written contract is complete and entire. If, then, there is nothing in the oral agreement which conflicts with the written contract, it would seem clear that all the elements necessary to a valid collateral undertaking have been established. In this connection it is proper to advert briefly to the 10th article of the written contract, which, so far as it bears any relation to the one we are now considering, reads as follows, viz.: "And it is hereby further understood and agreed by and between the parties hereto that this contract may be terminated at any time by either party giving

ninety (90) days' notice thereof, and without any liability on the part of the said Company, beyond the commission aforesaid, actually earned at the closing up of said Agency * * *."

And it is argued that the oral agreement necessarily extends the defendant's liability beyond that contemplated by the provision just quoted, and that, consequently, it must be in conflict therewith. So far from this being the case, however, we are of the opinion that article 10, when considered in connection with the oral agreement, furnishes satisfactory evidence of the fact that the two contracts, instead of conflicting with, are really independent of, each other. For it is to be observed that either party, upon giving ninety days' notice to the other, was at liberty to terminate the written contract at any time. This could have been done arbitrarily, and, as provided in article 10, without incurring any liability. And if the defendant had been content to confine itself to the exercise of this privilege no complaint could or probably would have been made by the plaintiff. But the difficulty is that the defendant did more than merely terminate the contract; it undertook to control the agents which the plaintiff had appointed, and thereby to secure to itself pecuniary advantage. As to whether it might do this without incurring any liability the original contract is silent. And right here is made to appear the distinctive feature of the parol agreement, which was designed to furnish the plaintiff protection against, and redress for, any such interference.

This, it seems to us, is sufficient of itself to sustain the plaintiff's claim that the parol contract is collateral to, and independent of, the written one; and if so it was not only proper to prove it by parol, but when thus proven the plaintiff was just as much entitled to recover for any breach of its terms as he would have been had it been reduced to writing. (*Thomas v. Scutt*, 127 N. Y. 133-140.)

The only remaining question to which our attention has been directed relates to the subject of damages. From the very nature of things it was difficult, if not impossible, to determine precisely what should be the measure of damages in such a case as this. Here was a contract proven; there was no question as to its breach; neither was there any doubt that the plaintiff had sustained considerable pecuniary injury in consequence thereof. In these cir-

cumstances the learned trial justice, after calling attention to the subject-matter of the contract, its conditions and the consequences which resulted from its breach, permitted the jury to say what was its actual value to the party injured. This, it seems to us, was a reasonable and proper rule to adopt. It enabled the jury to speculate somewhat as to the amount of damages to which the plaintiff was entitled, but it appears to be now well settled that a party shall not be permitted to escape all liability for violating a contract, simply because his liability cannot be accurately determined in dollars and cents. (*Wakeman v. W. & W. Mfg. Co.*, 101 N. Y. 205.)

Our conclusion of the whole matter is, that the action can be maintained; that it was tried upon the correct theory; that the record discloses no reversible error, and consequently, that the judgment and order appealed from should be affirmed.

All concurred, except GREEN, J., dissenting, and FOLLETT, J., not sitting.

Judgment and order affirmed, with costs.

A. H. ANDREWS & COMPANY, Appellant, v. OLIVER A. HESS,
Respondent.

Bills and notes—failure of consideration—fraudulent diversion—bona fide holder.

Where promissory notes are executed and delivered by their maker upon a promise made to him, by the secretary of a foreign corporation to the order of which they are made, to the effect that either he or the company will turn over to the maker advertisements sufficient to pay the notes, that the proceeds of these advertisements shall be applied to their payment, and that the maker shall never be compelled to pay anything upon the notes, a failure ever to turn over any advertisements to the maker constitutes a failure of consideration as well as a breach of the condition upon which the notes were delivered by the maker.

Where the company subsequently transfers the notes in payment of an antecedent debt to a person who merely receipts for the notes and gives credit therefor upon his books, the transferee is not a *bona fide* holder and the maker may as against him successfully interpose the defense of a fraudulent diversion.

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APPEAL by the plaintiff, A. H. Andrews & Company, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Onondaga on the 2d day of February, 1897, upon the decision of the court rendered after a trial at the Onondaga Trial Term, specific questions of fact having been submitted to the jury, who rendered a verdict in favor of the defendant.

Raymond Cobb, for the appellant.

Charles S. Kent, for the respondent.

ADAMS, J.:

The plaintiff brings this action to recover upon two promissory notes executed by the defendant on the 1st day of May, 1894, one of which was for \$2,000, payable six months after date, and the other for \$500, payable four months after date. These notes were made payable to the order of the Patent Telephone Indicator Company, and upon the back of each was the following indorsement, viz.:

"I secure the payment of this note by \$27,000 worth of unincumbered stock I own stock in the United Glass Co., of Syracuse, N. Y., & any other assets I may this day be possessed of.

"O. A. HESS."

These notes, as it appears, were given upon the assignment of certain territorial rights in the Patent Telephone Indicator Company, which was a corporation organized under the laws of the State of Illinois, and engaged in business within the State of New York, although it had never filed a certificate with the Secretary of State of the latter State, as required by section 15 of chapter 687 of the Laws of 1892.

The evidence tends to show that one Walter F. Burns, the secretary and manager of the indicator company, applied to the defendant to purchase these territorial rights, and to induce him to do so represented to him that the invention owned by the company was a very valuable one and that a large amount of money could undoubtedly be realized therefrom if he would make the purchase.

This "indicator" was an instrument which was designed to be hung alongside of telephones, and connected therewith was a curtain containing a list of telephone subscribers. Upon one side of the

curtain a space was left for advertisements, the idea being that these advertisements would be constantly brought to the notice of telephone subscribers, and that the indicator would consequently prove a valuable advertising medium.

It was represented that the revenue to be derived from these advertisements would exceed \$500 a year on every 1,000 indicators in use, and this fact constituted the chief pecuniary value of the right to sell the indicator.

Upon the trial the defendant was permitted to prove that, at the time the notes in suit were given, and as an inducement to their execution and delivery, Burns stated to him that he simply wanted the notes to show the company that he had made a sale, and that if the plaintiff would give them, he (Burns) would obtain advertisements from some of the larger advertisers, such as "Hood's" and "Paine's Celery Cure." The defendant testified that he hesitated about giving the notes, whereupon Burns stated to him: "If you will give me your notes, I will instruct my solicitors to get the advertisements at once, and I will turn them over to you at \$480 apiece, and you can assign them to me, and I will collect them and credit them on the notes. So you will never have to pay one dollar. * * * In case I do not get the contracts to fill the outside spaces, I will hold the notes and they will not be presented till we have fulfilled our contracts together."

And that the defendant thereupon said: "Under those considerations, as long as you will procure enough contracts and agree to hold the notes till you do that, I will sign the notes. But I want it distinctly understood that I have no money to pay these notes outside of the contracts that you will secure for me."

The defendant, relying, as he said, upon this assurance, executed and delivered the notes to Burns and took from him a receipt in writing which reads as follows, viz.:

"SYRACUSE, N. Y., 1st May, 1894.

"Rec'd of O. A. Hess, Esq., three notes—two for \$500, each payable in 4 m., and one for Two thousand dollars; payable in 6 months. Said notes are rec'd by me as Sec. and Gen. Mgr., Patent Telephone Ind. Co., Chicago, and as said Sec. & Gen. Mgr., I hereby bind said Patent Telephone Indicator Co. to issue unto said O. A. Hess a valid and good assignment of all our rights in Patent Tele-

phone Co. for Syracuse, & further, to issue to him a guarantee to protect said patents against any infringements for full time of patents.

“W. F. BURNS,

“*Sec. & Gen. Mg., P. T. I. Co.*”

No advertisements were furnished the defendant by either Burns or the indicator company, and just prior to the maturity of the notes they were transferred to this plaintiff.

Upon the trial the facts which have thus far been detailed were made to appear by the evidence of the defendant, and they were not contradicted by Burns, who was not even sworn as a witness.

At the conclusion of the evidence the defendant asked leave to amend his answer to conform the same to the proofs, and this motion was granted upon conditions which it is unnecessary to detail. But it was thereupon stipulated in open court that a single question of fact might be submitted to the jury, and that, upon the rendition of a verdict thereon, the remaining issues should be determined by the court. In pursuance of this stipulation, the following question was duly submitted to the jury, viz.: “Was it agreed by Burns with Hess, at the time the notes in suit were given, that he or the Patent Indicator Company, which he represents, would turn over to Hess advertisements enough to pay the notes; that the notes would be held and the proceeds of the advertisements applied to their payment, and Hess not be compelled to pay anything on them?”

This question was answered by the jury in the affirmative, and their verdict was subsequently adopted by the court, which also found, upon evidence which fully sustains the finding, that no advertisements were furnished the defendant, and that the plaintiff took these notes to apply upon an antecedent debt owing it by the indicator company.

Upon these facts the court concluded, as matter of law: (1) That the notes were fraudulently transferred by the Patent Indicator Company to the plaintiff; (2) that they were wrongfully and fraudulently diverted from the purposes for which they were given and from their true destination by the Patent Telephone Indicator Company when it transferred them to the plaintiff; (3) that the failure of the Patent Telephone Indicator Company to keep the notes in suit and perform its agreement with the defendant would

have constituted a defense to the notes if the same had been retained by the original payee ; (4) that the plaintiff is not a *bona fide* holder of the notes before maturity for a valuable consideration, and (5) that the defendant is entitled to judgment dismissing the complaint, with costs.

The issues, as finally framed, and the proofs contained in the record before us justify the conclusions reached by the learned trial court provided the evidence of the defendant respecting the contemporaneous oral agreement entered into between him and Burns at the time of the execution of the notes in suit was properly received over the plaintiff's objection.

It is quite obvious, we think, that the main inducement which led the defendant to execute and deliver the notes in suit was the oral agreement on the part of the indicator company to furnish him advertisements or business and to hold the notes until the profits from these advertisements and business were sufficient to pay the same. It is equally plain, so far as we are able to discover from reading the testimony in the case, that these advertisements were the principal source from which the defendant anticipated any profit or benefit from the purchase of the territorial rights assigned to him by the indicator company.

It is fair to assume, therefore, that had not this inducement been held out to him he would not have made the purchase. Indeed he so states, and we think it follows that this promise furnished a part of, if not the entire, consideration for these notes, and that when the indicator company failed to fulfill its promise it may be said that the notes were practically without consideration. We have consequently this state of facts presented to us, which is virtually undisputed :

The notes in suit were given for the purchase of a patent right on the oral agreement of the payee that it would retain the same in its possession until it had furnished the maker with advertisements from which sufficient profits could be derived to pay the notes, and this agreement has been wholly disregarded by the payee. This state of facts, in our judgment, constitutes a defense to these notes in the hands of any one but a *bona fide* holder thereof for value. For it brings the case fairly within the rule that the delivery of the notes having been limited by the conditions upon which the delivery

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was made, the performance of those conditions was essential to the validity of the notes. (*Miller v. Gambie*, 4 Barb. 146; *Seymour v. Cowing*, 1 Keyes, 532.)

The doctrine established by the authorities just cited has been repeatedly recognized and adopted by the courts of this State. (*Benton v. Martin*, 52 N. Y. 570; *Bookstaver v. Jayne*, 60 id. 146; *Reynolds v. Robinson*, 110 id. 654; *Higgins v. Ridgeway*, 153 id. 130; *Garfield Nat. Bank v. Colwell*, 57 Hun, 169.)

In the case of *Benton v. Martin* (*supra*) it was held that the annexing of conditions to the delivery of a note is not an oral contradiction of the written obligation, though the instrument be negotiable, as between the parties to it or others having notice thereof; and in the case of *Higgins v. Ridgeway* (*supra*), which is the latest decision involving a consideration of this question, the rule as stated in the *Benton* case is reiterated and the precise language of the latter case is adopted.

We think the fair and reasonable import of the defendant's evidence in this case is that the delivery of the notes in suit was conditional; that such delivery was simply to enable Burns to prove by some tangible evidence that he had made a sale for his company; that there was practically no consideration for the notes, and that in violation of the oral agreement they were diverted from their true destination.

If, as a matter of fact, such diversion was fraudulent, as was found by the trial court, and as we think it was fully justified in finding, then the case seems to fall within still another rule, which is, that an oral agreement, made contemporaneously with a written instrument, may be proved when the circumstances would make the use of the latter, for any purpose inconsistent with the oral agreement, dishonest or fraudulent. (*Juilliard v. Chaffee*, 92 N. Y. 529.) But, of course, as has been already intimated, the defense of diversion, whether fraudulent or otherwise, is not available to the defendant in this action if the notes in question came into the plaintiff's hands before maturity, for value and without notice. It only remains, therefore, to determine whether such was the fact.

The uncontradicted evidence upon this branch of the case is that the Patent Telephone Indicator Company was indebted to the plaintiff in the sum of \$6,000; that the notes in suit were turned over

to the plaintiff to apply upon this indebtedness; that a receipt therefor was given by the plaintiff to the indicator company, and that the notes were credited to the latter upon the books of the plaintiff. These facts, we think, are insufficient, within the authorities, to constitute the plaintiff a *bona fide* holder for value, so as to exclude the defense that the notes were wrongfully diverted by the payee from the purposes for which they were made. (*Phoenix Ins. Co. v. Church*, 81 N. Y. 218; *Vietor v. Bauer*, 11 N. Y. St. Repr. 531; *affd.*, 143 N. Y. 672.)

We are fully persuaded, therefore, that the judgment appealed from should be affirmed.

Judgment affirmed, with costs.

All concurred.

Judgment affirmed, with costs.

LUCIUS BRADLEY, Appellant, v. ADELBERT C. GLASS, Defendant.
JOHN L. SHULTZ and CARRIE E. WELLS, Respondents, v. ADELBERT
C. GLASS, Defendant.

Confession of judgment — insufficient statement of the cause of the indebtedness — amendment of the statement allowed.

A confession of judgment whose statement alleges that the debt is "for goods sold and delivered to me by plaintiffs prior to the date hereof, and that said goods were sold and the payment thereof became due as aforesaid," is insufficient under subdivision 2 of section 1274 of the Code of Civil Procedure, as it does not show what the goods were, nor when or where they were sold, nor what was their value.

The insufficiency of such a statement appearing to be the result of inadvertence rather than of design, the court considered that an amendment thereof should be permitted upon reasonable terms.

APPEAL by Lucius Bradley, the plaintiff in the first above-entitled action and a judgment creditor of the defendant in each of the above-entitled actions, from an order of the Supreme Court, made at the Onondaga Special Term and entered in the office of the clerk of the county of Cayuga on the 19th day of February, 1897, denying his motion to vacate a confession of judgment made by the defend-

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ant, Adelbert C. Glass, in favor of John L. Shultz and Carrie E. Wells.

Mortimer V. Austin, for the appellant.

M. F. Dillon, for the respondents.

ADAMS, J. :

The appellant is a judgment creditor of the defendant Glass, his judgment being subsequent in point of time to one confessed by the same defendant in favor of John L. Shultz and Carrie E. Wells; and he is endeavoring to have the prior judgment vacated upon the ground of the insufficiency of the statement upon which the confession was entered.

It is required by subdivision 2 of section 1274 of the Code of Civil Procedure that, "If the judgment to be confessed is for money due or to become due, it must state concisely the facts out of which the debt arose; and must show that the sum confessed therefor is justly due or to become due."

The statement accompanying the judgment in question is that the judgment confessed is for a debt or liability justly due the judgment creditors which arose upon the following facts, viz. : "For goods sold and delivered to me by plaintiffs prior to the date hereof, and that said goods were sold and the payment thereof became due as aforesaid."

The requirement of section 1274 was designed, as was said in the case of *Wood v. Mitchell* (117 N. Y. 439), to enable an interested party to ascertain from an examination of the statement "whether the confession of judgment was accurate, honest and *bona fide*;" and we are persuaded that this particular statement falls short of accomplishing that purpose. In fact, it furnishes little or no information in respect to the precise nature of the indebtedness to secure which the judgment was confessed, save that it was "for goods sold and delivered." But what the goods were, or where they were sold, or what was their value, does not appear. They may have been of little or no value, and they may have been sold ten or twenty years prior to the date of the confession; in either case the statement would have been literally true, although a confession of judgment resting upon such a consideration might well be regarded as a fraud upon the rights of subsequent judgment creditors.

Our attention has been directed to a recent decision of this court which, it is claimed, involved a question like the one now under consideration and arose under somewhat similar circumstances. (*Burhans & Black Co. v. Blanchard*, 12 App. Div. 624.) No opinion was written in that case, but it will be found, upon referring to the record, that the statement which was there deemed sufficient contained the very elements which, as we have shown, are wanting in this case. Moreover, it is fair to say that, even with these additional facts present, this court reached the conclusion it did in the case cited with some little hesitation, and certainly with no intention of furnishing a precedent for any further relaxation of the principle which was there considered and applied.

Having reached the conclusion that the statement contained in the first confession of judgment was inadequate, it follows that the subsequent judgment creditor can avail himself of this defect (*Chappell v. Chappell*, 12 N. Y. 215), and that his motion should have been granted. But, inasmuch as the insufficiency of the statement was probably the result of inadvertence, rather than of design, we think this court is fairly called upon to exercise the power which it doubtless possesses, of permitting an amendment upon such terms as are reasonable. (*Mitchell v. Van Buren*, 27 N. Y. 300; *The Union Bank v. Bush*, 36 id. 631.)

The order appealed from is, therefore, reversed, with ten dollars costs and disbursements, and the motion granted, with ten dollars costs, but with leave to the judgment creditors, in the first confession, to obtain from the judgment debtor an amended statement, and to file the same as of the date when the original statement was filed, at any time within twenty days from the service of the order of reversal herein, upon his paying the costs above specified, and when so filed it shall have the effect of validating the judgment as against all subsequent creditors, except the appellant herein.

All concurred, except FOLLETT, J., not sitting.

Order appealed from reversed, with ten dollars costs and disbursements, and the motion granted, with ten dollars costs, with leave to obtain and file an amended statement of confession in the manner stated in the opinion.

BERNARD F. MARTIN, Appellant, v. DAVID GOLDSTEIN, Respondent.

The inadvertent service of a summons upon a Jew on Saturday is not a misdemeanor and the process is valid.

Section 271 of the Penal Code, providing that "whoever maliciously procures any process in a civil action to be served on Saturday, upon any person who keeps Saturday as holy time, and does not labor on that day, or serves upon him any process returnable on that day, or maliciously procures any civil action to which such person is a party to be adjourned to that day for trial, is guilty of a misdemeanor"—when construed in view of the fact that the 1st and 3d clauses of the section contemplate that the acts therein recited should be done maliciously, and of the principle that penal statutes should always be construed in favor of civil liberty, and that the section occurs in that part of the Penal Code defining crimes against religious liberty and conscience, and that to constitute a crime there must be not only the act itself, but a criminal intent must accompany it—does not apply to a person who inadvertently procures a summons to be issued out of the Municipal Court of the city of Rochester, whose procedure is similar to that of a court of a justice of the peace, against a Jew, who uniformly observes Saturday of each week as "holy time," and has it made returnable on Saturday, and such summons and its service are valid.

APPEAL by the plaintiff, Bernard F. Martin, from a judgment of the County Court of Monroe county in favor of the defendant, entered in the office of the clerk of the county of Monroe on the 17th day of November, 1896, which affirmed upon appeal a judgment of the Municipal Court of the city of Rochester, vacating a warrant of attachment and a summons issued in the above-entitled action.

This action, which was brought to recover for goods sold and delivered by the plaintiff to the defendant, was commenced in the Municipal Court of the city of Rochester on the 9th day of April, 1896.

At the time of the issuing of the summons a verified complaint was duly filed, upon which, as well as upon accompanying affidavits, a writ of attachment was issued, and the same was subsequently served upon the defendant with the summons and complaint.

The summons was made returnable upon the 18th day of April, 1896, which was Saturday. Upon the return day the defendant appeared in the action for the sole purpose of objecting to the jurisdiction of the court upon several grounds, but more especially for

the reason that the defendant is a Jew, and that as such he uniformly observes Saturday of each week as "holy time." This fact was made to appear by affidavit, to meet which the plaintiff filed a counter affidavit containing a statement to the effect that the summons was made returnable on Saturday through inadvertence, without malice, and without any intent to fix the return thereof on a day kept holy by the defendant.

On the defendant's motion the summons and warrant of attachment were vacated and judgment was rendered in favor of defendant. From the judgment thus entered an appeal was taken to the County Court of Monroe county, where the judgment of the Municipal court was affirmed, and from the judgment of affirmance this appeal is brought.

Frank J. Hone, for the appellant.

Jacob Spahn, for the respondent.

ADAMS, J. :

By express legislative enactment the Municipal Court of the city of Rochester is to be deemed a Justice's Court, and the procedure therein is governed by the provisions of chapter 19 of the Code of Civil Procedure, which relates to courts of justices of the peace. (Code Civ. Proc. §§ 3226, 3227; *Baird v. Helfer*, 12 App. Div. 23.)

This action was, therefore, properly commenced by a summons made returnable upon a day fixed and specified therein. But the return day, unfortunately for the plaintiff, happened to be on Saturday, and when the defendant appeared it was made known for the first time that he was a member of the Jewish faith, and that as such it was a part of his religion to observe Saturday as "holy time." It was thereupon made to appear, by the affidavit of the plaintiff's attorney, that the return day of his summons was specified through inadvertence and without any intention of fixing the same on a day kept holy by the defendant, and also without realizing at the time the same was fixed that the return day was Saturday.

These facts are uncontroverted, and the sole question, therefore, for this court to determine is, whether or not they constitute a crime against religious liberty and conscience, and the determination of this question involves a construction of section 271 of the Penal Code, which reads as follows: "Whoever maliciously procures any

process in a civil action to be served on Saturday, upon any person who keeps Saturday as holy time, and does not labor on that day, or serves upon him any process returnable on that day, or maliciously procures any civil action to which such person is a party, to be adjourned to that day for trial, is guilty of a misdemeanor."

It is contended on behalf of the defendant that, upon the undisputed facts in this case, the plaintiff has, in making his process returnable on Saturday, rendered himself amenable to the penalty declared by this section, and that in consequence thereof the process by which he sought to commence this action is absolutely void.

It is quite obvious that this contention must prevail, provided the premise upon which it rests is tenable. For although the statute does not in express terms forbid the return of a legal process upon a day regarded as holy by the party upon whom it is served, yet the penalty which it imposes implies a prohibition; and to all intents and purposes its violation entails the same consequences as would follow if its language were more explicit. (*Griffith v. Wells*, 3 Den. 226; *Leavitt v. Blatchford*, 5 Barb. 9-29; *Smith v. Joyce*, 12 id. 21; *Barton v. Port Jackson*, 17 id. 397; *Best v. Bauder*, 29 How. Pr. 489; *Matter of the City of Buffalo*, 68 N. Y. 167.)

The case, therefore, resolves itself into this one crucial question, is the plaintiff guilty of the misdemeanor defined by the section above quoted? Upon a careful analysis of the section, it will be discovered that three separate and distinct acts are therein impliedly prohibited: (1) The malicious procuring of the service of any process in a civil action on Saturday upon a person who keeps that day as holy time; (2) the service upon such a person of any process returnable on that day; and (3) the malicious procuring of an adjournment to that day of a hearing in a civil action to which such a person is a party. It will also be discovered that, in order to constitute an offense so far as the 1st and 3d subdivisions above mentioned are concerned, the element of malice must be established; whereas, such is not apparently the case as regards the 2d subdivision. And it is consequently argued that a party who unintentionally and inadvertently causes a process to be made returnable in violation of this statute is just as amenable to punishment therefor as if he had acted from a malicious motive.

It must be conceded, we think, that if strict grammatical rules

are to be observed in our effort to interpret this statute, the defendant's contention is entitled to very serious consideration; and the same may be said if the ordinary rules of legal construction are to control. For the use of the word "maliciously" in connection with the 1st and 3d subdivisions, and its omission from the 2d, are certainly facts which possess considerable significance. But, with this much which is favorable to the defendant's contention admitted, we are nevertheless persuaded that the statute should not receive the interpretation claimed for it; and this conclusion is reached by adhering to certain well-recognized canons of construction which may perhaps be termed extraordinary, because not generally resorted to, but which are, nevertheless, just as available and just as potent in proper cases as are those to which we have already adverted.

One of these rules is, that a penal statute should always be liberally construed in favor of civil liberty; or, to adopt the language of an eminent text writer upon this subject: "Let everything that is in favor of power be closely construed; everything in favor of the security of the citizen and the protection of the individual comprehensively, for the simple reason that power is power, which is able to take care of itself, and tends by its nature to increase, while the citizen wants protection." (Lieber's Political Hermeneutics, chap. 6, § 10; also, see Dwaris on Statutes, chap. 2; *The V. C. C. Co. v. Murtaugh*, 50 N. Y. 314; *Hintermister v. The First Nat. Bank of Chittenango*, 64 id. 212; *Wood v Erie Ry. Co.*, 72 id. 196.)

With this rule in mind, the plaintiff is in a position to invoke still another, which is, in effect, that the intent of the Legislature in enacting a particular law must govern where such intent is manifest, even though the construction thus given seems contrary to the precise letter of the statute. And, furthermore, that where the intent is at all obscure or ambiguous resort may be had to other parts of the same statute, and even to the title; in order to ascertain its true intent. (*Smith v. The People*, 47 N. Y. 330; *Matter of Rochester Water Comrs.*, 66 id. 413; *People ex rel., etc., v. Coleman*, 121 id. 542.)

Turning, therefore, to the section under consideration, we find that it is a part of chapter 1 of title 10 of the Penal Code, which defines crimes against religious liberty and conscience. Now, it is

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elementary that to constitute a crime there must be not only the act itself, but a criminal intent must also accompany the act. (*Stokes v. The People*, 53 N. Y. 164-179; *People v. Powell*, 63 id. 88-91.) And yet, in order to give to this section the construction claimed for it by the defendant's counsel, we must hold that the Legislature has not only utterly ignored this elementary principle, but, in violation thereof, has declared that while in the case specified malice or intent must exist in order to constitute the crime of procuring a process to be served on Saturday, or of procuring a civil action to be adjourned to that day, the crime of serving a process which is returnable on Saturday may be committed without any intent accompanying the act. This proposition, it seems to us, has only to be stated to render its absurdity manifest; for the person who served the summons in this action, as is generally the case, was a public officer; and it is fair to assume that he performed his official duty in this instance without knowing, or having any reason to suppose, that the party served regarded one day of the week as more sacred than another. It is true that the defendant is a Jew, and certain racial characteristics may have manifested themselves to such an extent as to acquaint the officer with that fact, but there are other religions than the Jewish which require the observance of the seventh day of the week as "holy time," and, consequently, if the rule contended for is to obtain, an officer must somehow ascertain, in every instance before serving a process, that the party upon whom it is to be served does not come within the favored class; otherwise he renders himself amenable to the statute.

It is inconceivable that the Legislature intended that a person thus serving a process returnable on Saturday, in ignorance of the fact that he was in any way interfering with the religious liberty of the party served, should be regarded as a criminal, and it is equally certain that a conviction under such circumstances would be absurd and unjust, if not impossible. A construction of a statute, therefore, which leads to such a result should manifestly be avoided if practicable. (*In re Folsom*, 56 N. Y. 60; *People v. Jaehne*, 103 id. 182.)

Chancellor KENT, in laying down certain general rules for construing statutes, says that the intent with which they were enacted "is to be collected from the context, from the occasion and necessity of

the law, from the mischief felt and the objects and the remedy in view; and the intention is to be taken or presumed, according to *what is consonant to reason and good discretion.*" (1 Kent's Com. *462.)

Applying the principle thus stated to the case in hand, it would certainly seem "consonant to reason and good discretion" to hold that it was the design of the Legislature to punish only such persons as intentionally, that is, maliciously, annoy and vex any class of citizens who religiously observe any part of the week as "holy time," by either serving them with process upon that day, or procuring a process to be made returnable upon, or a hearing in a civil action to be adjourned to, that day.

If we are correct in this conclusion it follows that the summons, as well as the warrant of attachment issued in this action, was not void, and that the judgment appealed from should, therefore, be reversed.

Judgment reversed, with costs.

All concurred, except WARD, J., dissenting.

Judgment of the County Court and of the Municipal Court reversed, with costs.

CHARLES N. POCHEL, Respondent, v. ELGENE L. READ and WILLIAM E. READ, Appellants.

Chattel mortgage — when not shown to be fraudulent as to creditors.

The mere fact that a mortgagee of potatoes testifies, upon the trial of an action involving the validity of his mortgage, that the mortgagor said "that if he didn't get the money of me he would have to sell his potatoes, and I took the mortgage so that he might keep his potatoes," does not necessarily show that the mortgage was fraudulent; and where, in such a case, it appears that the mortgagee, in money and by the surrender of a note of the mortgagor, paid full value for the mortgage, and that the mortgagor applied substantially all the cash proceeds towards the payment of his creditors, the jury is justified in finding that the mortgage was not given with an intent to hinder, delay or defraud creditors.

APPEAL by the defendants, Elgene L. Read and another, from a judgment of the Supreme Court in favor of the plaintiff, entered in

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the office of the clerk of the county of Erie on the 3d day of February, 1896, upon the verdict of a jury, and also from an order entered in said clerk's office on the 15th day of April, 1896, denying the defendants' motion for a new trial made upon the minutes.

The action was brought to recover for the value of personal property sold upon an execution issued upon a judgment against Edward F. Pochel, the plaintiff claiming title to the property under a chattel mortgage executed by Edward F. Pochel to the plaintiff, Charles N. Pochel, prior to the defendants' levy upon the property. The trial was had before a judge of the Supreme Court and a jury. The jury rendered a verdict for the plaintiff for the value of the property taken under the execution.

Further facts appear in the opinion of the court.

W. G. Laidlaw, for the appellants.

John Cunneen, for the respondent.

WARD, J.:

The defendants' counsel upon the trial made a motion for the direction of a verdict in the defendants' favor upon the ground that by the evidence of the mortgagor and the mortgagee the mortgage was fraudulent as against creditors of the mortgagor, which motion was denied and the defendants excepted, and upon this appeal it is insisted by defendants' counsel that the transaction is condemned by section 1, title 3, chapter 7, part 2 of the Revised Statutes, which is the section making void transactions made or had "with intent to hinder, delay or defraud creditors," and that upon the evidence in this case we must find as a matter of law that the mortgage was void for the reason that the conceded acts of the parties to the mortgage did hinder and delay the creditors with intent so to do, and makes the further point that if this were not true still the evidence before the jury, when reviewed by this court, so clearly established an intent to defraud, hinder and delay the creditors of the mortgagor on the part of the parties to the mortgage that we must so find and reverse the judgment and order.

This requires a brief statement of the facts as they were fairly established before the jury.

The plaintiff and the mortgagor were half brothers; the plaintiff resided at East Aurora, in Erie county, and his brother in the town of Yorkshire, Wyoming county. On the 16th of January, 1895, Edward F. Pochel was indebted to the plaintiff upon a promissory note which had been given for value, borrowed money, goods sold and other considerations, amounting to \$279, principal and interest. A few days before that time Edward had applied to the plaintiff for a loan of \$1,000 in money, stating that he needed the money to pay some debts, and that if he could not get the money he would have to sell potatoes, of which he had a considerable quantity and which he wanted to keep for a better price, as the price was then too low. The plaintiff said that he did not feel like putting up this money on those potatoes, as the price might go down instead of advancing; that he did not have the money, but would have to borrow it, to which Edward replied that he could take a mortgage on the potatoes and his other personal property to secure him for the money, and it was agreed that the mortgage should be executed if the plaintiff would procure the money. He went to a banker and procured the money, \$900, and the mortgage was executed to secure the repayment of that money and the amount due upon the note and some small items, making an aggregate of \$1,225, whereupon the note was surrendered to Edward and the \$900 paid to him and the mortgage duly filed in the town clerk's office of the town of the mortgagor's residence. The mortgage covered all of the personal property of the mortgagor, or substantially so, and it does not appear to have been more than sufficient security for the amount secured. Edward on the day, and within a day or two after the execution of the mortgage, paid substantially all of the money that he had received to various creditors, paying three of them on the very day of the execution of the mortgage. The mortgage was in the usual form without any conditions expressed therein authorizing the mortgagor to retain possession of the property, but there was some evidence tending to show that the parties agreed verbally that the mortgaged property should remain in the mortgagor's possession until the plaintiff wanted it. The defendants were judgment creditors of the mortgagor, and in their answer justified the taking of the property under an execution issued upon their judgment. There were about 2,000 bushels of the potatoes. The plaintiff tes-

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tified that "He (the mortgagor) said that if he didn't get the money of me he would have to sell his potatoes, and I took the mortgage so that he might keep the potatoes. I didn't know there were two thousand bushels. * * * I took his word for it."

It is upon this statement, disconnected from the other evidence in the case, that the learned counsel for the defendants insists that it was established upon the trial as a matter of law by the testimony of the mortgagee himself that the mortgage was taken to hinder and delay the creditors of his brother, but we cannot extract a single statement or line from the evidence of the witness and draw an inference therefrom, especially an inference of fraud, but we must take the testimony altogether. The sting seems to be taken out of this statement by other statements of this witness, where he says that unless the creditors were paid his brother said he would have to sell his potatoes, which he did not want to do because the price was low, and he testifies that the giving of the chattel mortgage was not for the purpose of hindering, delaying or defrauding any person whatever, and that he had no such intention. Indeed, the jury might fairly infer from the evidence, which they undoubtedly did, that instead of executing the mortgage for the purpose of hindering and delaying the creditors, the purpose was to raise money by means of the mortgage to pay the creditors and thus prevent a sacrifice of the potatoes at a low price, which would be necessary if the money were not borrowed. This being so, there was no intent to hinder or delay the creditors, the intent rather being to aid them in collecting their debts. The transaction must not only hinder and delay the creditors, but there must be an intent to do so. It is difficult to conceive of a transfer or assignment of property by way of general assignment, mortgage or otherwise that does not tend to delay the collection of the debts of the creditors. But these transfers, if made in good faith and without intent to hinder or delay, will be sustained. We are unable to say, therefore, as a matter of law, that the transaction was fraudulent or that there was an intent to hinder and delay the creditors on the part of the plaintiff.

The questions were questions of fact for the jury. The learned trial judge fairly submitted these questions to the jury, and specially charged them that, as there was no change of possession of the property mortgaged, a presumption was created that it was fraudu-

lent as against the creditors of the mortgagor, which presumption the plaintiff should overcome with a fair preponderance of evidence. We think that such evidence was given as to enable the jury to reach that conclusion. This view disposes of the other point made by the defendants and leads to the conclusion that the judgment and order should be affirmed.

All concurred, except FOLLETT, J., not sitting.

Judgment and order affirmed, with costs.

CHARLES LUPEAN, Appellant, v. CEPHAS L. BRAINARD, Respondent.

Statute of Frauds — it must be pleaded — waiver of the objection that it is not — proof, without objection, of an oral contract not to be performed within one year — an amendment of the answer, setting up the statute, changes the defense.

Where proof of an oral contract to render services, which, by its terms, is not to be performed within one year, has been received without objection upon the trial of an action brought to recover damages, because of a breach thereof by the employer, and the answer, denying each and every allegation of the complaint "which is not hereinafter admitted," fails to plead the Statute of Frauds, that defense is not available to the defendant, upon a motion for a nonsuit based upon the Statute of Frauds, made at the end of the trial.

Seemle, that a failure of the plaintiff, when such a motion was made, to call the attention of the court to the fact that the answer did not set up the defense of the Statute of Frauds, was not a waiver of the plaintiff's right to question the soundness of the decision made upon such motion.

Seemle, that a court of a justice of the peace has no power, at such a stage of a trial, to permit the defendant to amend by setting up the statute, as such an amendment would change substantially the defense.

APPEAL by the plaintiff, Charles Lupean, from a judgment of the County Court of Chautauqua county in favor of the defendant, entered in the office of the clerk of the county of Chautauqua on the 10th day of July, 1896, upon a nonsuit granted by the court, and also from an order entered in said clerk's office on the 25th day of January, 1897, denying the defendant's motion for a new trial made upon a case containing exceptions.

The complaint in the action set forth that the parties entered into a contract by the terms of which the plaintiff was to work for the

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defendant for one year from the 21st day of March, 1894, on defendant's farm in the town of Portland, Chautauqua county, for which services of the plaintiff the defendant agreed to pay him \$250 in addition to furnishing him with a house and garden, fire wood, and pasture for a cow ; that the plaintiff had fully performed his part of the said agreement ; that after the plaintiff had worked eight months under this contract the defendant discharged him from his employ without just cause, for which plaintiff had suffered damage and for which he demanded judgment.

The defendant answered, denying each and every allegation in the plaintiff's complaint contained "which is not hereinafter admitted." The answer proceeded to state a payment to the plaintiff, and further alleged a contract to employ the plaintiff and his wife to work on the farm in Portland at the rate of \$250 per year, and that they continued to work for the defendant as long as the parties could agree, the contract set forth in the answer being substantially the same as that alleged in the complaint, except that the compensation was to be at the rate of \$250 per year, and not for that period. The answer further alleged a breach of the contract on the part of the plaintiff, and counterclaim for damages. The Statute of Frauds was not set up in the answer, or any allegation that the contract was within its provisions. There was no general denial in the answer, except as above stated.

Upon the trial the plaintiff testified without objection that sometime in the spring of 1895 he engaged with the defendant to work for him for a year for \$250, and that the contract was made in a conversation had with the defendant. He proved the verbal contract by other witnesses, the same as alleged in the complaint. No objection was taken to the evidence, or that the contract was within the statute, until the close of the trial, when the defendant moved for a nonsuit upon the ground that the contract as proved was void under the Statute of Frauds, inasmuch as it was not in writing and was not to be performed within one year from the making thereof. The motion was granted.

Hooker & Dikeman, for the appellant.

Franz C. Lewis, for the respondent.

WARD, J.:

Some of the earlier cases seem to hold that, if the answer contained a general denial of the contract alleged in the complaint, the plaintiff must establish a valid contract, and if he gave evidence showing a contract within the Statute of Frauds the defendant was at liberty, under the general denial, to take that objection, although it had not been affirmatively pleaded in the answer.

Upon this question there is some confusion, however, in the earlier cases, and it is unnecessary to review them.

It was said by BRADLEY, J., in *Smith v. Slosson* (89 Hun, 568; 35 N. Y. Supp. 548), that there had been a conflict in the earlier cases upon this subject, but the doctrine of the later cases is that it must be pleaded to render the Statute of Frauds available as a defense.

And such is the decided trend of the later cases. (*Hamer v. Sidway*, 124 N. Y. 538; *Wells v. Monihan*, 129 id. 161; *Crane v. Powell*, 139 id. 379; *Bannatyne v. Florence Milling Co.*, 77 Hun, 289; *Barrett v. Johnson*, Id. 527; *Cheever v. Schall*, 87 id. 32; *Schultz v. Cohen*, 34 N. Y. Supp. 927; *Smith v. Slosson*, *supra*; *Thelberg v. National Starch Manufacturing Co.*, 2 App. Div. 173; *Simis v. Wissel*, 10 id. 323.)

In *Schultz v. Cohen* (*supra*) there was a general denial in the answer.

And in *Crane v. Powell* (*supra*) the answer, as in the case at bar, admitted certain allegations in the complaint, but denied all other allegations, which included the contract that it was claimed was within the Statute of Frauds. But there was no allegation in the answer alleging the Statute of Frauds; that was a case like the one at bar, where the contract was oral, and, by its terms, was not to be performed within one year, and the plaintiff was permitted to prove without objection a verbal agreement to the effect set forth in the complaint, and it was held that a motion to dismiss the complaint on the ground that the agreement, not being in writing, was void under the Statute of Frauds, made at the close of the plaintiff's evidence, was properly denied. Judge O'BRIEN says (at p. 388): "The present system of procedure is founded upon the idea that litigants should, when possible, know in advance the precise questions they must meet at the trial. When a contract is set out in

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the complaint as the cause of action, and the defendant intends to assail it on some special or statutory ground, the general spirit of the system is not complied with unless notice is given of this intention to the opposing party by the pleadings.

"In the solution of this question the provisions of the Code should not be overlooked. The statute may be used as a defense to actions on certain agreements. A defense must now be presented either by demurrer or answer. (Code, sec. 487.)

"When the defect in the plaintiff's cause of action appears on the face of the complaint, the defense must be interposed by demurrer. (Sec. 488.) When the complaint does not, as in this case, disclose an invalid agreement upon its face, but it is, in fact, invalid for some reason, *the defendant must take the objection by answer* (sec. 498), and if the objection is not taken in either way, the defendant is deemed to have waived it. (Sec. 499.) The conclusion is thus reached that the defendant waived the benefit of the statute, in this case, by omitting to plead it."

This case further held that the provisions of the Statute of Frauds, declaring contracts void which, by their terms, are not to be performed within one year unless in writing, does not prohibit the making of an oral agreement. It simply creates a new defense and introduces a new rule of evidence; *i. e.*, it requires that the agreement shall be proved by a writing, and, as has been shown, such defense to be available must be alleged.

Where the complaint states a contract, but does not aver whether it is in writing or not, for the purposes of the complaint it will be presumed that it was in writing. (*Marston v. Swett*, 66 N. Y. 209.)

So that the objection, in this case, should have been taken by answer.

It is claimed in the brief of the respondent's counsel that the plaintiff did not raise the point upon the trial that the answer did not allege the Statute of Frauds as a defense, and, therefore, that the objection that it had not done so was waived. The record does not disclose how the fact was, whether plaintiff's counsel upon the trial, in opposition to the granting of the motion for a nonsuit, stated this objection. The pleading was before the court, and it was apparent from it that the defendant was not in a position to urge the ground upon which the nonsuit was granted.

We do not think that the failure (if such failure existed) of the plaintiff's counsel to call the court's attention to this defect in the answer, was a waiver of the fatal ruling made by the County Court. That learned court, in an opinion given upon the motion for a new trial, said that if the sufficiency of the answer had been raised upon the trial, the point might have been obviated by the action of the court or of the adverse party; the answer might have been amended, and the defendant have been permitted to set up the Statute of Frauds.

As we have said, the record does not disclose whether the question as to the sufficiency of the answer was raised at the trial, but it does disclose that the evidence of the plaintiff's contract was received without objection, and several of the cases we have cited lay great stress upon the failure to make such objection as a ground of waiver of the defense. The statement in the opinion that the question was not raised at the trial cannot be regarded as a part of the record upon which we are to act, but, assuming that the opinion in this regard is correct as to the fact, it was not necessary for the plaintiff to do so, as his proof had been received regarding the contract without objection, and the pleadings were before the court.

In *Simis v. Wissel* (*supra*) it was held in a case much like the one at bar in principle that it was too late, upon the denial of a motion to dismiss the complaint made at the end of the trial, to apply for leave to amend the answer by setting up therein the defense of the Statute of Frauds.

And it was also held that it was doubtful whether the court had power to grant such an amendment, as to have done so would have changed substantially the defense.

We are clearly of the opinion that the plaintiff, upon the trial, did not waive his right to question here the soundness of the decision of the County Court.

The judgment and order should be reversed and a new trial granted, with costs to abide the event.

All concurred, except FOLLETT, J., not sitting.

Judgment of the County Court reversed and a new trial ordered, with costs to abide the event.

NIAGARA FALLS PAPER COMPANY, Respondent, v. GEORGE A. LEE
and GERTRUDE E. LEE, Appellants.

Indemnity bond against damage to vessels by reason of existing contracts — where a vessel is libeled because of such a contract, the indemnitors cannot show that the contract was void — measure of damages — duty to make the damages as small as possible.

Proof that the vendors of three vessels, which it was claimed had been and were intended to be used as consorts, and of which only one, the *St. Louis*, was a steamer, had indemnified their vendee "from any and all loss, damage and liability whatsoever arising from or by reason of any debts or contracts, maritime or otherwise, which were made or contracted prior to the 13th day of February, 1892," and that one of the sailing vessels was subsequently libeled, on a maritime contract of freight, made prior to February 13, 1892, at Milwaukee, where the other sailing vessel then was loaded with oats for Buffalo, entitles the vendee to damages for the detention of the vessel libeled; nor can the vendors, as a defense to such claim for damages, show that the claim under which the vessel was libeled was not valid.

Where it appears that, at the time of the libel and detention, the *St. Louis* was undergoing repairs at Buffalo, and that the vendee did not intend to send her to Milwaukee to tow the two vessels there to Buffalo, and, so far as appears, another steamer could have been procured to tow the other vessel which was not libeled to Buffalo, the vendee cannot recover for the alleged detention of the *St. Louis* and that of such last-mentioned sailing vessel, as it does not appear that they were detained as a direct, necessary and natural result of the detention of the libeled vessel.

The law imposes upon a party, subjected to an injury by a breach of contract by the other party, the active duty of using reasonable exertions to make the injury as light as possible, and, it seems, of showing with certainty the damages resulting therefrom, and of not leaving them to speculation or conjecture.

APPEAL by the defendants, George A. Lee and another, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Erie on the 24th day of March, 1896, upon the verdict of a jury for \$1,282.47, and also from an order entered in said clerk's office on the 2d day of April, 1896, denying the defendant's motion for a new trial made upon the minutes.

The action was to recover damages that the plaintiff had sustained by reason of delay to the steamer *St. Louis* and two schooners (the

Champion and the *Potomac*), caused by the libeling of the *Champion* in the United States District Court at Milwaukee in the spring of 1892. These vessels, on the 18th of February, 1892, were the property of the defendant Gertrude E. Lee. On that day the plaintiff purchased these vessels of her, taking a bill of sale for each, and on the 29th day of February, 1892, the defendants, upon a sufficient consideration, executed and delivered to the plaintiff an instrument in writing, as follows:

"This agreement, made the 29th day of February, 1892, by and between George A. Lee and Gertrude E. Lee, of the city of Buffalo, parties of the first part, and Niagara Falls Paper Company, of Niagara Falls, N. Y., party of the second part.

"Witnesseth, that in consideration of the purchase by the parties of the second part of the vessels *St. Louis*, *Champion* and *Potomac* of and from the said parties of the first part, the said George A. Lee and Gertrude E. Lee do hereby jointly and severally, by these presents, undertake and agree to indemnify and save and keep harmless the said party of the second part from any and all loss, damage and liability whatsoever arising from or by reason of any debts or contracts, maritime or otherwise, which were made or contracted prior to the 13th day of February, 1892. The said grantors to indemnify the grantee against any damage for loss in consequence of any debts or contracts, maritime or otherwise, entered into before February 13, 1892."

At the time of the execution of this bond the *Champion* and the *Potomac* were at the port of Milwaukee, where they had been left by the *St. Louis* in the fall of 1891. The *St. Louis* was at the port of Buffalo. The *Potomac* was loaded with oats for Buffalo. The *Champion* was light, having discharged a cargo which had been delivered by rail, but a marine contract for freight had been entered into prior to the 13th of February, 1892, which provided for the delivery by the *Champion* of a cargo of corn at Buffalo, and on the 6th of April, 1892, the *Champion* was libeled in the United States District Court at Milwaukee upon this contract. The *Champion* was arrested upon the warrant issued upon this libel, and was detained thereby from the 6th day of April until the 29th of April, 1892, a period of twenty-three days, when she was bonded and discharged by proceedings taken by the defendants.

One John L. Crosthwaite, a vessel broker, residing at Buffalo, was the agent and manager of the plaintiff in the transactions, and negotiated the sale of the vessels, received notice by telegram of the libeling of the *Champion* on the 6th of April, and notified the defendants immediately, and, according to his testimony, they promised to execute a bond and have the *Champion* released, and kept promising frequently to do so, but neglected it until the twenty eighth of April. The *St. Louis* was undergoing repairs in Buffalo during the month of April by direction of the plaintiff, but she was ready to leave for Milwaukee about the twentieth of April, and it would take four and a half to five days for her to make the trip, so that she could not have arrived at Milwaukee to tow the *Champion* or the *Potomac* until about the twenty-fifth of April. The *Potomac* remained with her cargo at Milwaukee until the twenty-second of April, when she was towed to Buffalo alone by a vessel procured by the plaintiff. The *St. Louis* did not go to Milwaukee before the *Champion* was released, and the plaintiff's agent testified: "I did not start the *St. Louis* up there on the 6th; did not intend to start her at all. I intended to get those boats down here by towing them with outside steamers. I expected to tow them (the *Potomac* and the *Champion*) both together."

The plaintiff sought to recover in the action upon the indemnity bond above set forth, and over the defendants' objection gave evidence upon the trial as to the value of use of the *St. Louis* per day during ten days that the plaintiff's agent testified that the *St. Louis* was detained in consequence of the libeling of the *Champion*. The question put to the agent was: "Q. How long was the *St. Louis* detained waiting for the *Champion*?"

The defendants objected to this question, that there was nothing to show that the *St. Louis* had been detained; that the liability of the defendants could go no further than for the detention of the *Champion*; that it was an improper measure of damages.

This objection was overruled, and the witness answered: "A. I figure it as ten days, and ten the *Potomac*; the *St. Louis* and *Potomac* were each detained ten days."

The witness was then asked what was the value per day, and over the defendants' objection that it was not the proper measure of damages and as against the defendants was immaterial, the witness

answered: "A. On the basis of freights in 1892 she was worth at least one hundred dollars a day with the Potomac, and for ten days one thousand dollars."

The trial court submitted the question to the jury whether it was reasonable for the plaintiff to recover damages for the delay of the *St. Louis* and the *Potomac*, and if so, the jury were permitted to find such damages, to which the defendants excepted.

Carlton E. Ladd, for the appellants.

Frank R. Perkins, for the respondent.

WARD, J. :

The defendants upon the trial offered to show in effect that the claim or contract upon which the *Champion* was libeled was not a valid claim; this the trial court refused to permit, and the defendants urge such refusal here as serious error. This contention cannot prevail. The condition of the indemnity bond was that the plaintiff should be indemnified "against any damage or loss in consequence of any debt or contract, maritime or otherwise."

It is conceded that there was a maritime contract in existence whereby the *Champion* was to transport a load of corn to Buffalo, and, as a result of the non-performance of that contract, she was libeled and detained. Against such a mischief the indemnity bond was aimed, and it was not necessary that the plaintiff should establish, as upon a litigation between the parties to the contract, the validity of the contract or that it could be enforced. The contract was sufficient to create the cause of detention which created the damage complained of by the plaintiff.

In *Trustees of Newburgh v. Galatian* (4 Cow. 340) it was held that a bond to save harmless and indemnify against the costs and expenses of a *certain act* extends to the costs of defending a groundless suit for the act in which the obligee succeeded, and that the rule that a covenant for quiet enjoyment is not broken until a lawful suit and eviction is technical, applying to that particular covenant, and does not extend to a bond of indemnity.

In *Home Insurance Company v. Watson* (59 N. Y. 390-394) an action had been brought upon an indemnity bond which indemnified the insurance company against the claims of a certain per-

son upon certain insurance moneys and from all costs, etc., that should arise therefrom. GROVER, J., said: "It will be seen that the question is, whether the word claims, as used in the bond, was intended to include such only as were valid, and which were in fact enforced by legal proceedings, or was intended to embrace such as were asserted by legal proceedings, causing necessary expenditure in the defence, although ultimately adjudged invalid."

And the learned judge, with his usual clear reasoning, reached the conclusion that the word "claims" was not intended to embrace valid claims only, but to embrace any claims, whether valid or otherwise, that might subject the party indemnified to costs, delay or expense.

The cases cited upon this subject by the learned counsel do not assist us.

The serious question arising upon this appeal relates to the evidence of damages as to the detention of the *St. Louis* and of the *Potomac*. The plaintiff's contention upon the trial was that these three vessels had been used together upon the lakes, the two schooners being towed by the *St. Louis* as its consorts, and that it was in the contemplation of the parties, when the indemnity bond was given, that this condition should continue in regard to these vessels, and that the detention of one vessel would consequently detain the others. The plaintiff gave some proof tending to show that these three vessels had been previously so used upon the lakes. Such damage as resulted to the plaintiff from the delay of the *Champion*, by the libel proceedings, it can unquestionably recover. Whatever damage there may have been, it was proved in connection with the assumed damage or loss consequent upon the detention of the other vessels, and we cannot say how much of the loss occasioned by the detention of the *St. Louis* is embraced within the verdict of the jury, and if we conclude, therefore, that the case does not warrant an allowance of damage as to either the *St. Louis* or the *Potomac*, a new trial must be directed.

To entitle the plaintiff to damages for the detention of the *St. Louis* it must be made to appear that the vessel was detained as a direct, necessary and natural result of the detention of the *Champion*, or at least it must appear from the evidence that that was a proper question to be submitted to the jury.

The foregoing statement of facts shows that the *St. Louis* was in

no manner detained by the libeling of the *Champion*. It was not at the place it should have been if it were intended that it was to tow either the *Champion* or the *Potomac* to Buffalo. The concession of the plaintiff's agent is to the effect that it was not intended to send the *St. Louis* to Milwaukee for that purpose, and the evidence connecting the detention of the *St. Louis* with that of the *Champion* seems to have been a conclusion of the witness not based upon the facts.

It cannot be said that the damages claimed as to the detention of the *St. Louis* may fairly and reasonably be considered as naturally arising from a breach of the contract of indemnity.

It was said in *Griffin v. Colver* (16 N. Y. 491), by SELDEN, J., that the rule is fundamental which requires that the damages claimed should in all cases be shown by clear and satisfactory evidence to have been actually sustained, and that it was a well-established rule of the common law that the damages to be recovered for a breach of the contract must be shown with certainty, and not left to speculation or conjecture.

The most that can be said with regard to these damages is that they were remote and conjectural. The law does not assume to grant relief for all the possible consequences of the breach of a contract, but confines itself to those direct damages which flow from the breach complained of.

We may cite in support of this rule *Burton v. Pinkerton* (L. R. [2 Exch.] 340), where the plaintiff made a contract to serve on board an English ship as one of its crew on a voyage from London to Rio Janeiro, and back to a final port of discharge. At Rio the master engaged in an illegal business, and the plaintiff left the ship. While at Rio he was seized by the authorities and imprisoned as a Peruvian deserter. In an action for a breach of the contract the plaintiff was allowed to recover damages for the loss of the wages he might have earned, but was denied damages for the imprisonment.

BRAMWELL, B., in delivering the opinion of the court, says: "It is true that in one sense, the defendant's conduct *caused* the imprisonment: but for that, no doubt, the plaintiff would not have been imprisoned. That, however, is not enough. * * * According to the ordinary rule damage to be recoverable for the plaintiff must inevitably flow from the tortious acts of the defendant. It must be

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caused by him as the *causa causans*, and this imprisonment was not so caused."

In *Prosser v. Jones* (41 Iowa, 674) the defendant agreed to give the plaintiff \$100 for a threshing machine, and thresh his wheat at any time within four days after notice. This he failed to do, and the plaintiff, whose wheat was unstacked, and who was unable to get another machine to thresh it, brought an action to recover for such injury as it afterwards sustained and the expense of stacking it, but it was held that such damages were too remote to be recovered in an action for the breach of the contract.

Reference may be had also to *Fuller v. Curtis* (100 Ind. 237), and to *Osborne & Co. v. Poket* (33 Minn. 10).

It is unnecessary to multiply cases further upon this subject.

There seems to have been no difficulty in procuring a steamer to tow the *Potomac* from Milwaukee to Buffalo. It was the duty of the plaintiff, upon discovering that the *Champion* was detained and the *St. Louis* being in Buffalo, if it desired to tow the *Potomac* to Buffalo, to procure a vessel for that purpose and not wait for the discharge of the libel upon the *Champion*.

The plaintiff gave evidence which is claimed to have excused this delay, viz., the promise of the defendants to remove the cause of the detention of the *Champion*. As the *St. Louis* was not there to tow either of these vessels, and as another boat was to be procured for that purpose, there was no object in the *Potomac* waiting for the *Champion*, except expense might be saved by towing both of the vessels together. It is hoped that, upon another trial, the obscurity surrounding this situation as to the *Potomac* will be cleared up so that an intelligible judgment can be based upon it.

It is unnecessary to further comment upon the situation of the *Potomac*, or as to any claim of damages that may arise as to its detention at this time, as a new trial must be granted for the errors already referred to.

It is a wholesome rule that should be borne in mind in the disposition of these cases, that the law imposes upon a party subjected to injury from a breach of contract by the other party the *active duty* of making reasonable exertions to render the injury as light as possible. (*Hamilton v. McPherson*, 28 N. Y. 72; *Milton v. The Hudson River Steamboat Co.*, 37 id. 210.)

If, therefore, the delay of the *Potomac* and of the *St. Louis* was the result of the negligence of the plaintiff, or the result of its failure to provide other means for occupying the *St. Louis* and the *Potomac* during the period of the tension claimed, the loss should not fall upon the defendants.

The judgment should be reversed and a new trial granted, with costs to abide event.

All concurred, except FOLLETT, J., not sitting.

Judgment and order reversed and a new trial ordered, with costs to abide the event.

PATRICK F. BULGER, Respondent, v. JOHN COYNE and Mrs. JOHN COYNE, his Wife, Appellants.

Pleading — insufficiency of a complaint for the recovery of real property and rent — when a judgment by default must be directed by the court.

The complaint in an action alleged that the plaintiff was the sole owner of certain real estate, of which he had demanded the possession of the defendants, who refused to surrender the same to him; that the defendants had occupied the property as tenants and owed the plaintiff \$245 in unpaid rent; that the plaintiff had the right to the immediate possession of the property; that the defendants had no lease or contract of said property and had been notified to remove therefrom, and asked judgment that the property be declared to be the sole property of the plaintiff, and that the defendants be decreed to have no interest therein and to remove therefrom, and that plaintiff have judgment for \$245 unpaid rent and have possession of the property.

On the hearing upon a demurrer interposed to such complaint, it was *Held*, that the complaint did not state facts constituting a cause of action.

Semble, that where the court overrules a demurrer interposed to such a complaint, the plaintiff cannot, upon his own motion, enter a judgment for the amount of the rent unpaid, as, under the provisions of section 1507 of the Code of Civil Procedure providing that "if judgment is taken by default, the amount thereof must be ascertained by or under the direction of the court," in cases of default the court must ascertain by proof, in some proper manner, the amount of rent in arrear.

APPEAL by the defendants, John Coyne and another, from a final judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Oneida on the 23d day of March, 1897, upon the decision of the court, rendered after a trial

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at the Oneida Special Term, overruling their demurrer to the plaintiff's complaint, with notice of an intention to bring up for review an interlocutory judgment entered in said clerk's office on the 23d day of February, 1897, upon an order granted at the Oneida Special Term overruling said demurrer.

A. T. Wilkinson, for the appellants.

P. F. Bulger, in person, and *W. & N. E. Kernan*, for the respondent.

WARD, J. :

The plaintiff's complaint set forth as follows: "The complaint of the plaintiff alleges and avers that the plaintiff is the sole owner of the property hereinafter described; that he has demanded possession of the same from defendants and they have refused to surrender the same to plaintiff; that the said property has been occupied by said defendants as tenants from May, 1892, and that they owe the plaintiff \$245.00 in unpaid rent; that the plaintiff has the right to immediate possession of said property; that they, the said defendants, have no lease or contract of said property; that the plaintiff has notified them in writing to remove from the same (here follows a description of a lot in the city of Utica, N. Y., properly describing it).

"The Plaintiff demands a judgment and decree that the property be declared his, as the record shows it to be the sole property of plaintiff, and that the defendants Coyne and their family be decreed to have no interest in said property and to remove therefrom, and that the plaintiff have judgment for \$245.00 unpaid rent, and have immediate possession of said property and the costs of this action."

The defendants demurred upon two grounds: *First*, that it appears upon the face of said complaint that said complaint does not state facts sufficient to constitute a cause of action. *Second*, that it appears upon the face of said complaint that two or more causes of action have been improperly united because an action to recover real property, usually called an action in ejectment, is united with an action to determine a claim to real property, usually called an action to quiet title, and also with an action upon contract to recover a sum of money for rent.

The court, at Special Term, overruled the demurrer and judgment was entered upon the decision, and the defendants appeal to this court.

As far as can be determined from the crude and very informal allegation of the complaint, the pleader intended to set forth a cause of action to recover the possession of the premises for the non-payment of rent, which non-payment had caused a forfeiture of the term and terminated the tenancy. That being so, the question arises whether the complaint states a cause of action in favor of the plaintiff as landlord against the defendants, the tenants in ejectment. The nature of the tenancy thus claimed to be terminated does not appear. No term is stated. No contract of leasing is set forth. The statement simply is "that the said property has been occupied by said defendants as tenants from May, 1892, and that they owe the plaintiff two hundred and forty-five dollars in unpaid rent."

In this statement it does not appear whose tenants the defendants are, nor does it appear that the unpaid rent is due. No intelligent idea of the renting of the premises can be obtained from this statement.

Again, the complaint alleges "that they, the said defendants, have no lease or contract of said property." Does this mean that the tenants never had any lease or contract and were simply trespassers, or does it mean that, once having a lease or contract, it has expired and the tenants are holding over without the landlord's consent? We are left to conjecture as to what kind of an action, if any, the plaintiff has instituted.

The Code of Civil Procedure (§ 481, subd. 2) requires a plain and concise statement of the facts constituting each cause of action. The statement of facts must be intelligent and clear and without unnecessary repetition, pointing to the exact cause of action upon which the plaintiff relies.

Judge FINCH says, in *Cook v. Warren* (88 N. Y. 40): "We ought not to encourage loose or ambiguous pleading. The complaint is required to state plainly and concisely the facts constituting a cause of action. The pleader may not aver a legal conclusion as an equivalent for the group of separate facts from which it is an inference. The allegation should be such, and so stated, as to per-

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mit a distinct traverse and evolve a definite issue. Although pleadings are to be construed liberally, that does not necessarily mean that they shall be held to say what they do not, nor that words which have a fixed legal meaning, settled by the common law, or by statute, shall be enlarged or modified by an inaccurate popular use."

A glance at this complaint would leave the impression that the learned judge had a similar one in view in making this statement.

It is fundamental that the tenancy should be terminated either by the terms of the lease or contract creating it, or, in cases where notice is required to terminate the tenancy, that notice shall be given as in case of a tenancy from year to year, at will or at sufferance. In any event, the complaint should set forth the kind of tenancy, when created and the facts constituting the termination of that tenancy upon which the pleader relies to establish the default of the tenant and his liability to be deprived of the possession of the property that he occupies.

It is said in Wait's Actions and Defenses (Vol. 3, p. 54): "The right to terminate a lease for non-payment of rent arises only upon express agreement. In order to secure that remedy, therefore, it has become almost a universal custom to insert in leases a covenant to pay rent at stated times, with a right of re-entry in case of breach or an equivalent condition making the failure to pay a ground of forfeiture." (See, also, 1 Fiero Pr. Spec. Act. 98, and cases there cited.)

At common law where ejectment was brought for the non-payment of rent, a strict demand of the rent was required with great nicety on the precise day and for the precise amount required. (Gerard's Title to Real Estate [2d ed.], 195.)

But this strictness was dispensed with (4th George II, chap. 28) in England, where there were six months' rent in arrears and no sufficient distress upon the premises to countervail such arrears, but in all other cases these formalities should still be complied with. The substance of this statute appeared in the Revised Statutes of the State of New York (2 R. S. 505, § 30), and is now contained in the Code of Civil Procedure in section 1504, which is as follows: "When six months' rent or more is in arrear upon a grant reserving rent or upon a lease of real property, and the grantor or lessor, or

his heir, devisee or assignee has a subsisting right by law to re-enter for the failure to pay the rent, he may maintain an action to recover the property granted or demised, without any demand of the rent in arrear or re-entry on the property."

Section 1505 of the Code provides that "where a right of re-entry is reserved and given to a grantor or lessor of real property in default of a sufficiency of goods," etc., "an action to recover the property demised or granted may be maintained * * * at any time after default in the payment of the rent, provided the plaintiff, at least fifteen days before the action is commenced, serves upon the defendant a written notice of his intention to re-enter," etc.

These sections of the Code seem to contain all the modifications of the common-law rule on the subject under our system of practice.

Where the complaint stated, in substance, that the defendant was indebted to the plaintiff in the sum of \$300 for the use and occupation of certain lands therein described, being the property of the plaintiff, for and during a specified period, for which the plaintiff claimed \$300. Held, to be bad on demurrer. An action for use and occupation is founded on contract, express or implied, and lies only when the relation of landlord and tenant exists. A complaint which merely alleges that the defendant is indebted to the plaintiff in a certain sum is not sufficient. (*Hall v. Southmayd*, 15 Barb. 32.)

This complaint, it will be seen, was much more specific than the one at bar.

It is possible that the allegation in the complaint that the plaintiff is the sole owner of the property sought to be recovered may be held as equivalent to the allegation that the plaintiff is the owner in fee or in fee simple, under *Murphy v. Loomis* (26 Hun, 659); *Johnson v. Crookshanks* (21 Oreg. 339); *Garwood v. Hastings* (38 Cal. 216); *Lovely v. Speisshoffer* (85 Ind. 454), but the use of this expression should not be encouraged.

It is possible, also, that the allegation of the plaintiff's right to immediate possession is equivalent to the allegation that the defendants wrongfully withhold the premises under *Alvord v. Hetsel* (2 How. Pr. [N. S.] 88); *Taylor v. Crane* (15 How. Pr. 358); *Platto v. Jante* (35 Wis. 629) and kindred cases. But we cannot hold these allegations sufficient to sustain this complaint, because they must be construed in connection with the allegations in the com-

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plaint as to the tenancy, because upon those allegations the pleader must stand in asserting the possession of the defendant, and the right of the plaintiff to immediate possession must depend upon whether the tenant's right to possession had been terminated.

In no aspect, therefore, can we hold that this complaint is sufficient.

The defendants' second ground of demurrer, that two or more causes of action have been improperly united because it appears by the complaint that an action of ejectment is united with an action upon a contract to recover a sum of money for rent, is disposed of by what we have said in regard to there being no cause of action set forth in the complaint. There being none whatever alleged, there cannot be an improper joinder.

It is proper, however, that we should say that the provision in the judgment appealed from whereby it is adjudged that the plaintiff recover of the defendants \$245, his damages for the withholding of the premises, is erroneous. The learned judge at Special Term overruling the demurrer by his decision, did not authorize this judgment and it is not authorized by the complaint in the action. By section 1507 of the Code of Civil Procedure it is provided that "a verdict, report or decision in favor of the plaintiff must fix the amount of rent in arrear to the plaintiff, or, if judgment is taken by default, the amount thereof must be ascertained by or under the direction of the court."

The court, as we have seen, gave no such direction. This section would seem to contemplate that in cases of default the court must ascertain by proof the amount in arrear of the rent in some proper manner as in other cases of default.

The interlocutory judgment should be reversed, with costs, and the demurrer sustained, with costs, with leave to the plaintiff to amend his complaint within twenty days upon the payment of the costs of the demurrer and of this appeal.

All concurred, except FOLLETT, J., not sitting.

Interlocutory judgment reversed, with costs, and demurrer sustained, with costs, with leave to the plaintiff to amend his complaint within twenty days upon the payment of the costs of the demurrer and of this appeal.

DANIEL H. EVANS, Appellant, v. CHARLES M. WARNER, Respondent.

What facts establish a partnership inter sese — a managing partner not entitled to a salary.

A parol agreement, under which one person conducts a malt house while another furnishes the capital, sells the malt and collects its proceeds, accompanied by frequent mutual consultations and statements in regard to the business, which is found to have been conducted for the "mutual benefit of the parties," constitutes the persons partners *inter sese*, and each is entitled, in the absence of any special agreement in that regard, to have and bear respectively an equal proportion of the profits and losses.

The fact that the business was all conducted in the name of one of the parties, and that there was no express agreement between the parties that they were to be partners, does not preclude the existence of a copartnership.

A managing partner, in whose name the business is conducted, is not entitled to a salary where no agreement of the partners to that effect is shown.

APPEAL by the plaintiff, Daniel H. Evans, from a judgment of the Supreme Court in favor of the defendant for \$100, entered in the office of the clerk of the county of Onondaga on the 15th day of January, 1896, upon the report of a referee.

The complaint alleged that, in September, 1888, the defendant agreed with the plaintiff to assist him in the business of malting by loans and advances of money and credit, which loans were to be repaid with lawful interest; that in the years 1888 to 1891, inclusive, the defendant advanced to him money and credit, and furnished barley to be used by the plaintiff in the business of malting to the amount of \$53,000 over and above all sums paid to the defendant by the plaintiff; that during said years the plaintiff sold and delivered to defendant malt and sundry bags in the amount and value of \$63,000, and demanded judgment for \$10,000, with interest.

The defendant answered, denying the allegations of the complaint, and alleging that the business of malting referred to was carried on by the parties as partners; that the business ceased in 1891; that it had never been settled, and that the state of the partnership accounts could only be ascertained upon settlement. And by way of counterclaim the answer alleged that plaintiff was indebted to defendant on a promissory note executed by him December 10, 1889,

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for the payment of \$5,632.31 and interest, and demanded judgment for the counterclaim.

On the trial it was stipulated that the pleadings be deemed amended, so as to allow the referee to take and pass upon the accounts between the parties as copartners if he should find in favor of the existence of the copartnership, and for that purpose to receive any competent evidence that should be offered.

Upon the trial the referee took evidence as to the existence of the copartnership and as to the condition of the accounts between the parties as to the malting business.

The referee found that at the commencement of the action the defendant was the owner of the note set forth in the answer. No part of the note had been paid except seventy-seven dollars and thirty-seven cents, which the referee found should apply on the note, and the referee further found as follows :

“That in the month of September, 1888, the plaintiff and defendant entered upon the business of buying barley and converting the same into malt at a malt house in Lyons, New York, and selling the malt wherever the same could be sold to advantage and collecting the proceeds thereof ; that this business was conducted under the name and style of ‘D. Evans,’ and was continued by them until on or about the 1st day of November, 1891, when the business was discontinued.

“That the malting business above referred to was conducted for the mutual benefit of the parties and as a joint adventure or copartnership. That there was no express agreement between the parties as to the division of the profits or losses of the said business.

“That in or about the month of December, 1889, the parties had some correspondence and an interview as to the share of profits to which either should be entitled, the plaintiff suggesting that he should be paid a salary before a division of the profits should be made, the defendant answering that the division should be upon an equal basis. There the discussion as to the matter of division ended.

“The plaintiff generally purchased the barley and attended to its conversion into malt at Lyons, frequently consulting the defendant thereto. The sales of the malt there produced were substantially all made by the defendant, who also collected the proceeds of such

sales. That with the exception of about two hundred dollars, contributed by the plaintiff, the defendant furnished all the capital and credit for the conduct of the business. That the defendant, in the course of their business from time to time, furnished large amounts of money to the plaintiff for the conduct thereof, the money and credit thus furnished amounting in the aggregate to somewhere about \$50,000 or \$60,000. Much of this money was obtained by the discount at banks of commercial paper made by the plaintiff and indorsed by the defendant. The sum spoken of as contributed by the plaintiff has been credited to him upon the books of the company, and is thus allowed in the statement of accounts hereinafter made."

The referee further finds that the net profit of the malting business, carried on by the parties, was \$15,475.84, of which the defendant had received \$8,362.24 and the plaintiff \$6,951.31, and deducting the \$77.37 and the amount of the excess of profits that the defendant had received more than the plaintiff, and giving the parties credit on certain small accounts enumerated in the report, left a balance due to the defendant upon the promissory note of \$6,626.19, upon which, with the interest from the date of the report and costs, judgment was entered for the defendant.

The plaintiff duly excepted to the report.

Other facts are stated in the opinion.

Frederick A. Lyman, for the appellant.

Frank Hiscock, for the respondent.

WARD, J. :

The findings of the referee seem well sustained by the evidence.

The appellant claims that the referee has not found that a copartnership existed between the parties, but has only found that it was either a joint adventure or a copartnership, and that there was no express agreement as to the profits or losses of the business, and his counsel argued that if it were a joint adventure it must have been a technical one, citing definitions of that term to show that it can have no application to the case in hand.

The referee does find that the business was conducted for the "mutual benefit of the parties," and he evidently intended to find, and the effect of his finding is, that it was a business venture or

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copartnership where both parties were to share in the profits and losses as the business might result. (See *O'Hara v. Harman*, 14 App. Div. 170, 171.)

The nature of the arrangement was the same by whichever name it might be called. Assuming that there was such an arrangement and the parties had not agreed upon the proportion of profits or losses, the law settles the proportion.

The profits of a copartnership are to be divided equally unless there is a contrary stipulation or unless some fact or circumstance exists from which it may be inferred that the parties intended that the profits should be divided in certain unequal proportions, and there is a presumption of law in favor of an equality of interest in case of the property as there is of the profits. (Pars. on Part. [2d ed.] 258 *et seq.* and notes; *Turnipseed v. Goodwin*, 9 Ala. 372.)

A careful review of the evidence fails to disclose any facts tending to show that the parties intended that the profits should not be divided equally. On the contrary, there seems to have been a fair division of labor and responsibility between the parties as to the business carried on and in producing the profits that resulted from the business.

The plaintiff took charge of the work at Lyons; the defendant furnished the capital, attended to the selling of the malt, collected the pay therefor, and being the responsible party in the concern took the chances of losses and bad debts. The parties were in frequent consultation and statements were rendered to each other of the business carried on from time to time, so that it would seem equitable and just that the profits of the undertaking should be divided equally. It is true there was no written agreement of copartnership nor were there express words of agreement passing between the parties that they were to be partners.

Before entering into this business the parties, with another person, had carried on the tobacco business as partners, which resulted in a loss out of which the note set forth in the answer was created. The defendant was engaged extensively in the malt business, and he suggested to the plaintiff that money might be made in that business at Lyons; that there was a vacant malt house there; that he might go to Lyons and see if he could procure a lease of the building, which plaintiff did; a lease was taken in the name of the plain-

tiff by direction of the defendant; repairs were made upon the buildings at their joint expense; several conversations as to the business ensued between the parties, to the effect that they were to go into the business together and perform the work and furnish the capital, and do the things respectively which they ultimately did do. Several witnesses testified as to admissions of the plaintiff that he and the defendant were partners, and very important evidence came from the president of the Lyons National Bank, at which a number of notes of the concern were discounted. When the first note was presented (being \$3,000) by the plaintiff for discount, the president testified, the note having been made by the plaintiff and indorsed by the defendant, that the plaintiff said that he and the defendant were in partnership in the malting business at Lyons.

The learned counsel for the plaintiff, however, insists that, as the business was done in the plaintiff's name, as he was the maker of the notes given, as the bank account was kept in his name at Lyons, and the plaintiff's correspondence was conducted under his letter head and not that of the firm, and in view of other individual acts of the plaintiff in relation to the business, the inference of a copartnership was so far rebutted, when taken in connection with the correspondence referred to in the referee's report, that the finding that there was a copartnership should not be sustained; but there seems to be but little question in the evidence but what the business was carried on in the plaintiff's name by agreement between the parties, the defendant giving as a reason that, if his name was publicly connected with the concern, it would interfere with other malt transactions had with other parties.

The fact that a discussion arose between the parties as to the proportion of profits subsequent to the commencement of the business and towards its close, where the plaintiff claimed a salary in addition to a share of the profits, and about which the parties disagreed, is of no particular significance under the circumstances of the case, except to furnish a cause to the defendant for discontinuing the business and to cease furnishing the capital for the concern. There having been no agreement to pay the plaintiff a salary he was not entitled to it, in addition to a share of the profits.

A managing partner is not entitled to a salary in the absence of an agreement to pay it. (*Pierce v. Pierce*, 89 Mich. 233.)

The record is barren of any agreement that the money advanced by the defendant to the plaintiff was a loan to the plaintiff, to be repaid with interest, nor does it disclose any contract whereby the defendant was to purchase the malt of the plaintiff and pay him for it, so that the plaintiff's case, as set forth in the complaint, utterly fails, and this fact goes greatly to strengthen the defendant's theory of the case.

Parsons, in his work on Partnership (p. 6), defines a partnership to be "the combination by two or more persons of capital, or labor or skill, for the purpose of business for their common benefit."

Mere words of agreement do not necessarily create or destroy an arrangement that the law asserts is a copartnership.

Partnerships may be formed "not only by express agreement, but may grow out of transactions or relations in which the word 'partnership' is not uttered. If there is such a joinder of interests and action as the law considers as the equivalent of partnership, or rather such as it regards as constituting partnership, it will give to the persons engaged in it all the rights and lay upon them all the responsibilities * * * which belong to partnership." (Parsons on Part. [2d ed.] 9.)

And, as illustrating this view, reference may be had to *Mumford v. Nicholl* (20 Johns. 611); *Richter v. Farrell* (19 Atl. Rep. 687); *Fell v. Farrell* (Id. 688; 134 Penn. St. 482, 485); *In re Hulton* (62 Law T. Rep. 200); *Vaiden v. Hawkins* (6 South. Rep. [Miss.] 227); *Blain v. Desrosiers* (39 Ill. App. 50).

And in *Chapman v. Hughes* (37 Pac. Rep. 1048; 104 Cal. 302) it is said that where persons entering into a joint business enterprise contract to do all that in law is necessary to constitute a partnership, they are a partnership *inter se*, though they did not expressly intend to create such a relationship. (See, also, *Quine v. Quine*, 9 Smedes & M. [Miss.] 155; *Pursley v. Ramsey*, 31 Ga. 403.)

Whether two or more persons associating in business are partners as between themselves, depends upon their intentions as legally ascertained. (*Salter v. Ham*, 31 N. Y. 321.)

If we should assume, with the appellant, that the referee has not found the existence of a partnership as a fact, but only in the alternative, we are constrained to say, from a full examination of the evidence, that we are satisfied that the arrangement between the

parties was a valid copartnership and that the referee's conclusions are fully sustained by the evidence.

Several exceptions taken upon the trial as to the reception of evidence have been pressed upon our attention, but we are unable to find in any of them reversible error.

The judgment should be affirmed, with costs.

All concurred, except FOLLETT, J., not sitting.

Judgment affirmed, with costs.

COMMERCIAL BANK, Respondent, v. BEAMAN CATTO, Appellant,
Impleaded with Others.

Mortgage foreclosure — defense of false representations — to whom not available.

Seemle, that one who has purchased real estate subject to the lien of an existing mortgage cannot successfully allege, as a defense to an action brought to foreclose it, that the party from whom his immediate grantor purchased made fraudulent representations as to the value of the premises to such grantor upon which he relied, and that the holder of the mortgage in process of foreclosure participated in these fraudulent representations.

APPEAL by the defendant, Beaman Catto, from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of Monroe on the 3d day of August, 1896, upon the decision of the court rendered after a trial at the Monroe Special Term.

This action was brought to foreclose a bond and mortgage executed by James E. Briggs to his son, William H. Briggs, dated the 28th of October, 1892. The bond was in the penalty of \$60,000, and the mortgage secured the payment of \$30,000, and it provided that \$1,000, with interest, should be payable every six months until five payments were made, and after that in \$2,500 payments, all with interest until paid. The property mortgaged was the Brackett House property, so called, located in the city of Rochester.

The appellant and his wife, together with James E. Briggs, Moses Foltz and David J. Kirkpatrick, were made defendants. The action was commenced the 31st day of March, 1896, and the complaint claimed default in the payment of about \$2,500 due on the bond

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and mortgage, and about \$12,500 to grow due thereon. The complaint also alleged an assignment of the bond and mortgage to the plaintiff on the 28th of October, 1892.

The defendant Catto in his answer, among other things, alleged that the defendant Briggs was at one time the owner of the mortgaged property; that he sold and conveyed it to the defendant Foltz in August, 1893; that, to induce Foltz to make the purchase, Briggs represented that the Brackett House property was worth \$165,000; that it had cost him (Briggs) \$150,000, and that he had made repairs thereon to the extent of \$30,000; that these representations were false, intended to deceive Foltz, and that the cashier of the plaintiff's bank (the bank then holding the bond and mortgage in suit by assignment) and other officers of the bank participated, knowingly and fraudulently, in the false representations and in the scheme to induce Foltz to purchase the property; that, relying on such representations, he purchased the property and was greatly deceived and injured; that the property cost but \$85,000; it was not worth what it was represented to be, and the repairs thereon had not exceeded \$15,000; that the bond and mortgages were without consideration as between the parties thereto; that the plaintiff received the assignment without consideration; that on the 20th of March, 1896, Foltz sold and conveyed to Catto the mortgaged premises for the consideration of \$100,000 by warranty deed, and that Catto received said premises, subject only to a mortgage in favor of the Rochester Savings Bank of \$55,000 and a \$10,000 mortgage held by the plaintiff (not the one in suit), in which deed Foltz covenanted that there were no other mortgages or liens upon the premises except these two mortgages; that Catto gave a mortgage to Foltz to secure \$10,500 as part of the purchase money and made an arrangement with Foltz by which Foltz was to remain in possession of the mortgaged premises as mortgagee, with authority to collect the rents and apply the same to the payment of this bond and mortgage; that the mortgage in suit was a cloud upon Catto's title and demanded judgment that the mortgage in suit be canceled and discharged of record, and that the defendant should have such further relief as should be just. The action was tried at the Monroe Equity Term held in June, 1896, and, so far as concerns the defendant Catto, the case was tried by the court.

The court rendered its decision, stating the grounds thereof to be that the fraud, as claimed, between Briggs and the bank upon Foltz in the purchase of the property, was not sustained, and stating the amount due and to grow due upon the mortgage and bond and directing the usual judgment of foreclosure and sale. There were other findings which did not affect this defendant Catto.

Upon the trial the bond and mortgage were introduced in evidence, and the assignment thereof, which was absolute and unconditional, to the plaintiff and the allegation of the complaint as to there being a portion of the bond and mortgage due at the time of the commencement of the action and a portion not due was established by the evidence.

On the 29th of October, 1892, the day following the execution of the bond and mortgage in suit, the parties to that mortgage and the plaintiff entered into a written contract which recited the execution of the bond and mortgage and the assignment thereof by the mortgagee to the bank and the assignment of certain leases, and also that the mortgagor, James E. Briggs, was indebted to the plaintiff in the sum of \$20,000, and indebted to the Central Avenue Hotel Company (the party from whom he purchased the Brackett House) in the sum of \$10,000, secured by his bond and mortgage. It further provided :

"Now, therefore, it is hereby mutually agreed that said bond and mortgage first above mentioned (the one in suit) are given and assigned as aforesaid, in trust, for securing the said indebtedness to both the said bank and the hotel company and to protect the same by providing: (1), for interest on the same, and on the first mortgage of sixty thousand dollars (\$60,000) on said property (the Brackett House property) going to Rochester Savings Bank; (2), the city and county taxes; (3), the water rates, and (4), the insurance, and that the rents upon the leases so assigned, to be collected from month to month by the said James E. Briggs, shall be deposited upon special account in said Commercial Bank from month to month, and to be applied by said Commercial Bank, to whose account they are to be deposited to,

"First, the payment of the interest upon all said indebtedness according to the terms thereof, including said savings bank bond and mortgage.

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"*Second*, the payment of the city and county taxes.

"*Third*, the payment of the city water rates.

"*Fourth*, the payment of the installments of principal provided in the conditions of the bond and mortgage last made, to wit: to William H. Briggs.

"*Fifth*, the payment of the insurance, which is to be increased at least \$65,000, exclusive of elevator and boiler insurance.

"It is further mutually understood and agreed that when the terms of said last bond and mortgage so assigned shall have been met by said rents or otherwise, the same shall be canceled, discharged, or assigned as the said James E. Briggs shall in writing request."

This instrument was under seal. It appeared from the evidence that considerable commercial paper that had been made by James E. Briggs and held by the plaintiff had been indorsed by the son, William H. Briggs, and the Briggs testified that the mortgage was executed to William H. to secure him upon these indorsements. It appeared that the consideration that the defendant Briggs received for the Brackett House property was the conveyance by Foltz to him of about 110 acres of farming land near Tonawanda, in the county of Niagara; the price of this land was called \$85,304.25; the value of Briggs' interest in the Brackett House property was called in the trade \$75,000, and Briggs agreed to pay to Foltz the difference between the \$85,304.25 and the \$75,000 in payments by installments thereafter. Evidence was given tending to show the value of the land conveyed by Foltz in Niagara county at booming prices at from \$700 to \$750 per acre. Foltz was a witness upon the trial and testified that before he deeded to Catto he became aware from what transpired in a litigation in Niagara county that the Brackett House property did not cost Briggs, as he had represented, over \$160,000, but it had cost him only \$85,000. The defendant Catto alone appeals from the judgment of foreclosure. The Brackett House property was deeded by Briggs to Foltz, subject to the lien of the mortgage in suit and other liens.

John Van Voorhis, for the appellant.

Edward Harris, for the respondent.

WARD, J. :

The defense of the appellant Catto and of the defendant Foltz to the bond and mortgage in suit was based upon an assumed fraud that had been practiced by the defendant Briggs upon Foltz. The finding of the trial court, that no fraud had been perpetrated by Briggs and the plaintiff's officers upon Foltz, is so far sustained by the evidence that we are not at liberty to overrule the conclusions of the trial court upon the subject.

If we understand the contention of the appellant Catto it is that, by reason of this assumed fraud, the mortgage in suit became vitiated and void, or at least so far tainted with the fraud that its foreclosure will not be decreed by a court of equity. It is difficult to see how the appellant can avail himself of this assumed fraudulent transaction as between the other defendants Briggs and Foltz, and the learned and able brief of the appellant's counsel has failed to point out clearly how this can be done, but, be that as it may, it is sufficient to say that, eliminating the fraud from the case, the appellant's defense fails altogether unless it can stand upon the proposition that there was no consideration for the bond and mortgage as between the plaintiff and Briggs, and it is not in a position to enforce these securities because the claims or demands, to secure which the bond and mortgage were assigned to the plaintiff as collateral, were not due at the time of the commencement of the action. A careful review of the evidence does not lead to the conclusion that either of these defenses was established. The Briggs were parties to the contract of transfer of the bond and mortgage to the plaintiff. The statement of facts above given shows that a portion of the amount secured by the bond and mortgage was not only due at the time of the commencement of the action, but there was a sufficient consideration both for the execution of the bond and mortgage as between the Briggs, and also of the assignment thereof to the plaintiff.

We have considered the other points raised by the appellant's counsel, but are unable to discover any good reason that should lead to the reversal of the judgment appealed from, and we are led to the conclusion that the judgment should be affirmed. with costs.

All concurred, except FOLLETT, J., not sitting.

Judgment affirmed, with costs.

HIRAM W. FRITZ, Respondent, v. GEORGE P. WORDEN and LUCY M. WORDEN, Appellants.

Pension money — invested in real estate — transfer thereof in fraud of creditors.

Where a United States pensioner of the civil war conveys premises purchased with his pension moneys to his wife upon her oral agreement to reconvey them to him at his request, a person, ignorant of the wife's promise, who has accepted a note guaranteed by the husband and wife, upon the faith of her apparent ownership of the real estate, is entitled to maintain an action to set aside a reconveyance of the premises, designed to defeat his claim under such guaranty, made by the wife to the husband after the creditor had begun his action upon the note and guaranty.

Quere, whether the husband, by his conveyance to his wife, lost his right of exemption in the property conveyed as against his future creditors.

APPEAL by the defendants, George P. Worden and another, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Steuben on the 29th day of July, 1896, upon the report of a referee, which judgment set aside a conveyance of real estate in favor of the plaintiff as a creditor of the defendants.

The defendant George P. Worden was a soldier of the United States in the war of the rebellion, and received on account of total disability a large pension. In 1887 he purchased a house and lot in Hornellsville, N. Y., with pension money, taking the title in his own name. On the 17th of June, 1889, he conveyed these premises to the defendant Lucy M. Worden, his wife, by an absolute deed, and, by parol agreement between them, she was to deed the property back to him at his request. This conveyance was made upon a nominal consideration by George P. Worden to avoid the payment of debts which were pressing him at the time, and which he seems to have believed could be collected out of the property. The deed to the wife was recorded in Steuben county clerk's office on the same day, or the day following its execution.

These parties had a son, a young man, T. J. Worden. The plaintiff was engaged in the butchering business in Hornellsville, and he sold a half interest in his business to this son for \$400. The son not having the money, George P. Worden and his wife, the

defendant Lucy M. Worden, jointly and severally guaranteed a note of the son executed to the plaintiff for \$400, payable in six months with interest, dated April 2, 1894, and at that time the title to the premises was in Mrs. Worden. This note was not paid, and an action was commenced by the plaintiff to recover the amount thereof, and, after the commencement of such action, and on the 20th day of December, 1894, the defendant Lucy M. Worden conveyed the premises by an absolute deed to the defendant George P. Worden. There was no consideration for that transfer, the defendants testifying in effect that the transfer was made to carry out the parol agreement to reconvey above stated. On the 11th of January, 1895, judgment was recovered in said action against the defendants for \$418.66 damages and \$21.09 costs, upon which execution was issued and returned unsatisfied, and, after such return, this action to set aside the last-mentioned conveyance with a view of collecting the plaintiff's debt was instituted. It appeared undisputed in the evidence, and the referee so found, that the plaintiff was ignorant of the secret oral agreement to reconvey; that he believed that the defendant Lucy owned the land in fee unaffected by any right, trust or condition in her husband, and that the plaintiff accepted the guaranty of the said note and extended the credit to the maker of the said note upon the faith and credit of such belief of the ownership of Mrs. Worden in fee simple. The plaintiff testified that he accepted the guaranty, knowing that the wife was the owner of the real estate; that in accepting it he relied upon her solvency by reason of such title, and that he had no knowledge that the defendant George P. Worden had ever held title to the said real estate. The referee found that the conveyance made by the wife to the husband was made, executed and delivered by her and accepted by him without consideration and with intent on the part of each of the said defendants to hinder, delay and defraud this plaintiff as the then existing creditor of the wife, and, as a conclusion of law, the referee found that the said deed was fraudulent and void as against the plaintiff's judgment and that the plaintiff was entitled to a judgment setting aside the said deed and a decree that his judgment be a lien upon the said real estate and that the premises be sold and out of the proceeds the plaintiff's claim be collected.

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James H. Stevens, for the appellants.*F. A. Rathbun*, for the respondent.

WARD, J. :

An examination of the evidence in this case clearly shows that the conveyance from the defendant Lucy M. Worden to her husband, George P. Worden, of the premises described in the complaint was executed with the intent of the parties to the instrument to prevent the collection of the plaintiff's debt, and the finding of the referee upon that subject seems fully sustained. The learned counsel for the appellants seems to regard the house and lot that was purchased with the pension money as still exempt from execution as the property of George P. Worden, by virtue of the oral agreement to reconvey, and that he stands precisely in the same condition, having had the property reconveyed to him by reason of the oral arrangement, as though he had never parted with the title. The oral arrangement was void and could not be enforced. There was no fraud or mistake alleged. The conveyance was absolute from Worden to his wife, and the parol arrangement comes within the condemnation of *Sturtevant v. Sturtevant* (20 N. Y. 39); and *Wheeler v. Reynolds* (66 id. 227), and of the Statute of Frauds.

Any equities that may exist between Worden and his wife as to this transaction will not prevail against the plaintiff's equity as a creditor of the Wordens, having trusted them upon the strength of the wife's title to the premises, and without knowledge of the secret oral agreement.

The property was exempt in the hands of George P. Worden, as it was purchased with his pension money, and his creditors had no claim upon or interest in it, and he had the right to give it to his wife or any other party, and his grantee would not be liable to account for this property to his creditors, but when George P. Worden, for whatever reason, voluntarily disposes by an absolute conveyance, duly recorded, of his title to the property, and by his act thereby holding out to the world the title of that property in another, and permitting that other to obtain credit thereby, and his grantee having been trusted upon the faith of such title, equity will not permit him now to claim the property as exempt against such a creditor.

The pension money is used as a shield to protect the soldier from

want and to secure a support for his family, but it cannot be used as an instrument by which a fraud is perpetrated upon the public.

It is the settled law of this State that, under the provisions of the Code of Civil Procedure (§ 1393) exempting pensions granted by the United States, or a State, for military or naval services, from levy and sale on execution, where the receipts from a pension can be directly traced to the purchase of property necessary or convenient for the support and maintenance of the pensioner and his family, such property is exempt. This is a wise and just provision in favor of soldiers of the republic, and these provisions will be enforced by the courts in all proper cases. (*Yates Co. National Bank v. Carpenter*, 119 N. Y. 550, and cases there cited.) But when the pensioner parts with the title to the property in which his pension money is invested, or parts with the proceeds of his pension in any other form so that the rights of third persons as to that property intervene, the right to the exemption ceases, as, like all other exemptions, it is a personal privilege.

Judge BARKER says, in speaking for the General Term of the old fifth department, in *Burgett v. Fancher* (35 Hun, 650): "The favor of the statute is personal to the pensioner, and if he once relinquishes his privileges then, of course, it cannot be restored by any effort on his part."

It is, however, not necessary in this case to decide whether, by the conveyance from Worden to his wife, he lost his right of exemption in the property conveyed as against future creditors. We only hold that, as against the plaintiff, under the circumstances of this case, he cannot maintain the exemption he claims in the property.

The judgment appealed from should be affirmed, with costs.

All concurred, except FOLLETT, J., not sitting.

Judgment affirmed, with costs.

ANNA HODECKER, Appellant, v. EMMA STRICKLER, Respondent.

Action by a wife to restrain a woman from holding herself out as the lawful wife of the plaintiff's husband — insufficiency of the complaint — the case is not within the Penal Code § 562.

A complaint in an action which, after alleging that the plaintiff is the lawful wife of Frederick Hodecker, states that the defendant resides with him and that, although never married to him, she has in various ways falsely personated herself as, and claimed to be, his lawful wife, although well knowing that the plaintiff is his true and lawful wife, not accompanied by any allegation that the plaintiff has suffered any pecuniary damage, but that she has been scandalized, slandered, defamed, annoyed, humiliated and degraded, and otherwise injured to her damage of \$10,000, does not state a cause of action, nor do the facts alleged constitute a crime, under section 562 of the Penal Code, providing, among other things, that "a person who falsely personates another, and in such assumed character marries, or pretends to marry, or to sustain the marriage relation towards another, with or without the connivance of the latter, shall be punishable by imprisonment in a State prison for not more than ten years," as the complaint does not allege that, before marrying or pretending to marry, or prior to sustaining the marriage relation with Frederick Hodecker, the defendant falsely personated the plaintiff, the allegations in question merely amounting to a statement that the defendant has held herself out to the world as Mrs. Frederick Hodecker, conduct which, although morally indefensible and false in fact, does not bring the case within the statute.

APPEAL by the plaintiff, Anna Hodecker, from an interlocutory judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Monroe on the 7th day of August, 1896, upon the decision of the court rendered after a trial at the Monroe Special Term sustaining the defendant's demurrer to her complaint.

The plaintiff, in her complaint, states that she is the lawful wife of Frederick Hodecker, residing at No. 25 Gorham street, in the city of Rochester; that she has been known as such for a long time, and is exclusively entitled to be known as such; that the defendant resides with the plaintiff's husband at the place above mentioned, although she has never been married to him, and that, without any right and contrary to law, she has assumed to herself, and claims and bears the surname of "Hodecker;" that she also claims and pretends to be, and falsely personates herself as, the lawful wife of

Frederick Hodecker, and has executed various papers and instruments under the name of "Emma Hodecker," "Mrs. E. Hodecker" and "Mrs. Emma Hodecker," and has dealt with tradespeople as the wife of Frederick Hodecker, although well knowing that the plaintiff is his true and lawful wife.

There is no allegation that the plaintiff has suffered any pecuniary damage by reason of the defendant's acts, but she claims to have been scandalized, slandered, defamed, annoyed, humiliated, degraded, and otherwise injured, to her damage of \$10,000, for which she demands judgment, and she also asks that the defendant be restrained from using the name "Hodecker," and from holding herself out to the world as the wife of Frederick Hodecker.

Jacob Spahn, for the appellant.

C. C. Werner, for the respondent.

PER CURIAM :

The complaint as originally drawn was demurred to upon the ground that it failed to state facts sufficient to constitute a cause of action, and such demurrer was sustained at the Special Term, but the customary privilege to amend was granted. The amended complaint was in turn demurred to upon the same ground, and this was likewise sustained. From the interlocutory judgment entered thereon this appeal is brought.

Upon the first decision a very careful and comprehensive opinion was written by Mr. Justice BRADLEY (39 N. Y. Supp. 515), which commends itself to our unqualified approval, and while the plaintiff has availed herself of the privilege to reform her complaint, we are unable, after a careful reading of the amended pleading, to discover wherein she has successfully met the adverse criticism to which the first complaint was subjected.

But, if we correctly apprehend the present attitude of the plaintiff's counsel, he does not rely with so much confidence upon the amendments which have been incorporated into his pleadings as he does upon the general proposition that the complaint has, from the very first, contained a good and complete cause of action, inasmuch as it alleges facts which, if true, as they must be assumed to be in the present situation of the case, constitute a crime, his theory

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being, as we understand it, that this necessarily determines the wrongful character of the acts complained of, and requires that a court of equity shall discover some suitable remedy therefor. The crime which it is claimed has been committed by the defendant is that which is defined by section 562 of the Penal Code, which, so far as deemed applicable, reads as follows, viz.:

“A person who falsely personates another, *and in such assumed character* marries, or pretends to marry, or to sustain the married relation towards another, with or without the connivance of the latter, * * * is punishable by imprisonment in a state prison for not more than ten years.”

We do not wish to be understood as assenting to the proposition of the plaintiff's counsel, that the violation of any provision of the criminal law necessarily established a right to maintain a civil suit; nor is it necessary to seriously consider the same, for we think the learned counsel is clearly in error when he asserts that the defendant has violated the provision of the Penal Code just quoted, as it is not claimed that *before* marrying, or pretending to marry, or prior to sustaining the marriage relation with Hodecker, she falsely personated the plaintiff. Indeed, she never pretended to personate her. She has simply held herself out to the world as Mrs. Frederick Hodecker; and while in doing so, under the circumstances detailed in the complaint, she was undoubtedly guilty of conduct which was morally indefensible and false in fact, she did not thereby bring herself within either the letter or the spirit of the offense denounced by the section in question, and consequently the counsel's contention, so far as it is founded upon the supposed commission of a crime, is utterly fallacious.

But without prolonging the discussion of the various questions to which our attention has been directed, it is sufficient to say that, for the reason just stated, as well as for those given by Mr. Justice BRADLEY, we are of the opinion that the demurrer should be sustained.

Interlocutory judgment affirmed, with costs.

All concurred, except FOLLETT, J., not sitting.

Interlocutory judgment affirmed, with costs

JOHN A. LIGHTHALL, Appellant, v. MARY A. MCGUIRE, Individually,
and as Executrix, etc., of PHILLIP MCGUIRE, Deceased, Respondent.

Sale of real estate — action by the vendee to recover liquidated damages — failure to show performance or a tender thereof — exacting what the contract does not provide should be given.

The right of a vendee, in a contract for the sale of real estate, to recover liquidated damages, fixed by the contract in case of the failure of either party to perform, depends upon proof by him of a tender of performance or of his willingness and ability to perform in case performance was prevented or was expressly waived by the vendor.

Where, in such a case, it appears that the vendee, although having the money requisite to make his payment in a bank, did not have the money with him, or tender a check therefor or execute and have ready for delivery a bond and mortgage, which he was required by the contract to give the vendor in part payment, but insisted that he was entitled to certain timber not standing on the premises, and not mentioned in the contract, neither performance nor tender of performance is shown upon his part, and he is not in a position to recover the liquidated damages provided to be paid in case of a breach.

APPEAL by the plaintiff, John A. Lighthall, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Oneida on the 19th day of October, 1896, upon the verdict of a jury, and also from an order entered in said clerk's office on the 14th day of October, 1896, denying the plaintiff's motion for a new trial made upon the minutes.

Upon the 19th day of October, 1895, the plaintiff and defendant entered into a written contract for the sale by the latter to the former of about 2,300 acres of land, consisting of 21 separate parcels situate in the counties of Herkimer and Oneida in this State. The contract also embraced a quantity of personal property which was specifically mentioned therein. It likewise provided that, "On payment of the sum of Five Thousand dollars, to be so paid on or before the first day of December, 1895, the party of the first part covenants on that day to deliver to the party of the second part the deeds and bill of sale aforesaid; and concurrently therewith the party of the second part agrees to secure to the party of the first part the balance of the purchase money aforesaid by executing and delivering to her his bond therefor, with a mortgage upon the first eight parcels of land above described. * * *

And this provision was followed by a mutual covenant to the effect that the party failing to fulfill should pay to the other the sum of \$1,000, which sum was fixed and agreed upon as liquidated damages for such failure.

The first day of December falling upon Sunday, the parties met upon the following day, December second, at which time an extension was granted the plaintiff until December ninth in order that his counsel might have an opportunity to examine and pass upon certain abstracts of title of the premises which were furnished him that day by the defendant in fulfillment of one of the conditions of the contract.

Upon the ninth of December the parties with their respective counsel again met, at which time the plaintiff or his counsel claimed that the defendant's title to some portion of the lands in question was imperfect and not such as she was required by the terms of her contract to furnish. Some little controversy arose over this question of title, the result of which was that the parties separated without either of them actually performing or making a tender of performance.

Immediately thereafter the plaintiff brought this action to recover the amount of liquidated damages specified in the contract, claiming that he was prepared and ready to fulfill upon his part, but was prevented from doing so by the inability of the defendant to perform on her part.

J. A. McFarran, for the appellant.

Walter Ballou, for the respondent.

ADAMS, J. :

The contract between the parties to this action was a mutual one; and by its terms the plaintiff was required to pay to the defendant the sum of \$5,000 before he became entitled to receive or demand from the latter a deed of the premises. It follows, therefore, that the plaintiff's right to recover herein depended upon his proving either an actual tender of performance on his part or a willingness and an ability to perform in case performance was prevented or expressly waived by the defendant. (*Beecher v. Conradt*, 13 N. Y.

108; *Nelson v. Plimpton Fire Proof Elevator Co.*, 55 id. 480; *Smyth v. Sturges*, 108 id. 495.)

There is some evidence in the case tending to show that upon the 9th day of December, 1895, the plaintiff did have the sum of \$5,000 deposited in a bank in the city of Syracuse, subject to his check; and he testifies that he was prepared and willing to pay over the same to the defendant, and that he was also prepared and ready to execute and deliver the bond and mortgage required by the contract. He did not, however, have the money with him, nor did he tender any check therefor, nor were the bond and mortgage executed and ready for delivery. And it also appears that he did not demand a deed or bill of sale of the property described in the contract. On the contrary, it does appear, and this fact is not controverted, that when the parties met upon the second of December, and separated without consummating their contract, the plaintiff's attorney, McFarran, who, it seems, was fully empowered to act for the plaintiff, was informed by the defendant's attorney that if there was any disposition upon the part of the plaintiff to stand upon technicalities, Mrs. McGuire would tender him a deed of the premises, to which he replied that he would waive any technicality.

Furthermore, upon the trial, the defendant furnished considerable evidence tending to show that when the parties met at Forrestville upon the ninth of December it was claimed by the plaintiff that he was entitled to a quantity of spruce spars which were standing upon premises known as the "Blake Tract," in Herkimer county, which tract was not embraced in any of the parcels mentioned in the contract. Those spars were 436 in number and were of the value of \$1,190.

The defendant and her witnesses testified that this claim upon the part of the plaintiff was disputed; that she refused to accede to the plaintiff's demand, and that the plaintiff's counsel thereupon stated that if he could not have the spars there was no use of talking, and that they would go no farther in the matter.

This evidence was denied by the plaintiff and his witnesses, who, while admitting that a claim was made to the spars, say that their delivery by the defendant was not insisted upon as a prerequisite to the fulfillment of the contract upon the part of the plaintiff.

There is no mention in the contract of any spars; and, conse-

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quently, if, as contended by the defendant, the plaintiff did insist that he was entitled to them, and expressed his unwillingness to consummate the agreement unless his right to them was conceded, the defendant was unquestionably relieved from any performance or tender of performance on her part.

The record before us shows very clearly that there was a sharp conflict of evidence as respects this feature of the case, and an issue of fact was thereby presented which was very properly submitted to the jury by the learned trial justice. Indeed, that was the principal issue in the case, the court having held with the plaintiff that the defendant's title to some of the parcels of real estate was not a marketable title. Upon this single issue to which we have adverted the jury found in favor of the defendant, which, of course, defeated the plaintiff's right to recover damages. The evidence is quite sufficient to support the verdict thus rendered, and we find no justification for interfering therewith.

We have carefully examined the several exceptions taken by the plaintiff during the progress of the trial, but find in none of them any error which requires a reversal of the judgment and order appealed from. We conclude, therefore, that the judgment and order herein should be affirmed, with costs. Judgment and order affirmed, with costs.

All concurred, except FOLLETT, J., not sitting.

Judgment and order affirmed, with costs.

SARAH M. SIMMONS, Respondent, v. CATHARINE A. PETERS,
Appellant.

Negligence — an employee falling down an unlighted elevator shaft — the master cannot delegate the duty of lighting the gas — a failure to provide statutory automatic doors.

The duty of lighting gas, provided by an employer in order to afford to his employees a reasonably safe means of access to an elevator in a manufacturing establishment, is one which cannot be delegated by the employer, and the failure of an employee to light the gas in question will not exonerate the employer from liability to a co-employee injured by reason of its not being lighted.

An omission of the employer to comply with section 8 of chapter 462 of the Laws of 1887, requiring the owner of a manufacturing establishment to provide his elevator shafts with a trap or automatic doors, so fastened in the elevator shaft as to form a substantial surface when closed, and so constructed as to open and close by the action of the elevator in its passage, either ascending or descending, where such omission appears in an action brought by an employee to recover for injuries sustained in falling down an elevator shaft not provided with such an automatic attachment, may properly be alluded to in the charge to the jury, accompanied by a statement that it had nothing to do with the employee's right to recover unless it directly contributed to the injury complained of.

APPEAL by the defendant, Catharine A. Peters, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Onondaga for \$4,674.21 on the 19th day of November, 1896, upon the verdict of a jury, and also from an order entered in said clerk's office on the 23d day of October, 1896, denying the defendant's motion for a new trial made upon the minutes.

W. S. Andrews, for the appellant.

Horace White, for the respondent.

ADAMS, J. :

Upon a former appeal in this action it was held by the General Term in the fourth department that the evidence presented questions of fact respecting the negligence of both parties which should have been submitted to the jury, and that in taking the case from the jury the trial court committed an error which required a reversal of the judgment of nonsuit. (*Simmons v. Peters*, 85 Hun, 93. See, also, *Tousey v. Roberts*, 114 N. Y. 312.)

The case now comes up for a second review with no material change in the facts, nearly all of the evidence presented to the jury upon the last trial having been read from the printed appeal book. It is apparent, therefore, that the trial court was fully justified in submitting the case to the jury, and we are of the opinion that the evidence is amply sufficient to sustain the verdict rendered.

It is insisted, nevertheless, by the learned counsel for the appellant that a new trial should be granted in consequence of the alleged erroneous refusal of the trial court to charge in accordance with certain requests made at the close of the trial. These requests present

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but one or two questions which have not already been passed upon, and these, we think, are quite free from embarrassing complications.

It appears that at the time the plaintiff fell into the elevator shaft it was quite dark and that the gas was not lighted. It also appears that the gas fixtures were furnished by the defendant, and that in the winter time they were usually lighted by one Schindler, a co-employee of the plaintiff. The learned trial justice submitted to the jury, as one of the circumstances which might be considered upon the question of the defendant's negligence, the failure to have the gas lighted; but at the same time he was very careful to say, both in the body of his charge, as well as in response to a request of counsel, that the absence of these lights did not necessarily establish negligence.

After the jury had been thus instructed, the defendant's counsel requested the court to charge them that the absence of lights did not *tend* to establish negligence upon the part of the defendant, and also that, inasmuch as gas fixtures had been furnished, it was the duty of Schindler to light them; his omission to do so was the negligence of a co-employee, and not that of the master. The court refused to charge in the language of these several requests, and to such refusal the defendant's counsel duly excepted.

It is made apparent by reading the entire charge of the learned court that the absence of these lights was referred to in a very casual manner, and that it was not regarded as anything more than a slight circumstance to be taken account of by the jury. Still it was a circumstance which they had a right to consider as bearing more or less directly upon the question of the defendant's negligence, and the court was, therefore, justified in refusing to instruct them that it did not tend to establish negligence.

As respects the other branch of the question raised by these requests, we think there are two complete answers to the defendant's position. In the first place it does not satisfactorily appear that an attempt had been made to delegate the duty of lighting the gas to an employee. The most that can be said in support of this proposition is that Schindler usually lighted it in the winter time, and this accident to the plaintiff did not occur until April. But, even if Schindler was remiss in his duty, this did not exonerate the defendant, for the only object in lighting the gas was to furnish the

employees of the latter with a reasonably safe means of access to the elevator, and this was a duty which she could not delegate to a subordinate. (*Pantzar v. The T. F. I. M. Co.*, 99 N. Y. 368; *Benzing v. Steinway*, 101 id. 547; *Bushby v. N. Y., L. E. & W. R. R. Co.*, 107 id. 374; *O'Donnell v. E. R. G. Co.*, 91 Hun, 184.)

The case of *Kaare v. T. S. & I. Co.* (139 N. Y. 369), relied upon by counsel, involves quite a different question from the one we are now discussing.

Upon the trial it was conceded that the defendant had omitted to provide her elevator with an automatic attachment, in compliance with the provisions of section 8 of chapter 462 of the Laws of 1887, which require that "it shall be the duty of the owner * * * of any manufacturing establishment where hoisting shafts or well holes are used, to cause the same. * * * It shall also be the duty of the owner * * * provide * * * such proper trap or automatic doors, so fastened in or at all elevator ways as to form a substantial surface when closed, and so constructed as to open and close by action of the elevator in its passage, either ascending or descending."

In submitting the case to the jury the learned trial justice alluded to this omission, but stated in language that was not capable of misapprehension, that it had nothing whatever to do with the plaintiff's right to recover, unless it directly contributed to the accident of which she complains. At the conclusion of the charge the court was asked to instruct the jury that the absence of the automatic attachment did not contribute to the plaintiff's injury; and, further, that its absence, in the circumstances of this case, had nothing to do with such injury. These requests were both declined, and the defendant's counsel duly excepted.

We think neither of these exceptions presents error. It is true that, upon the occasion when the plaintiff received her injury, the door to the elevator had been opened by one Brown, who was in the defendant's employ, and that while it remained open the elevator car was at the top of the building. But it appears by the evidence of the witness Guetig, who was called as an expert, that, if the proper attachment had been provided, the door would have closed automatically, even under these circumstances, unless Brown had held it open, and it is by no means clear that he did so. It is difficult to see, therefore, upon what theory this element of negli-

gence could have been properly withheld from the jury. (*McRickard v. Flint*, 114 N. Y. 222; *Freeman v. G. T. P. M. Co.*, 15 N. Y. Supp. 657.)

The case, it seems to us, was carefully tried, and the various questions presented by the evidence were all submitted to the jury in such a manner as to deprive the defendant of any right to complain. We, therefore, think the judgment and order appealed from should be affirmed.

All concurred, except FOLLETT, J., not sitting.

Judgment and order affirmed, with costs.

JOSEPH R. SWAN, Respondent, v. MUTUAL RESERVE FUND LIFE ASSOCIATION, Appellant.

An action for the specific performance of an insurance contract — failure of the company to create and divide a reserve fund — a policyholder cannot sue for specific performance — the action lies against the officers and not the corporation only — constitutional law.

A mere policyholder of an assessment life insurance company cannot maintain an action against it in his own behalf and in that of other policyholders for the specific performance of a contract, contained in his policy, under the terms of which the company agrees to create and maintain, from its net earnings, a reserve fund, and to divide among the policyholders the surplus of that fund above a given amount, the complaint alleging that the company has failed properly to create and maintain the fund, and also that it has diverted its net earnings to other purposes, as such allegations, in effect, charge misconduct against its officers and directors, require something in the nature of an accounting by the company, and the action, if successful, will compel it to change its present method of conducting business.

An action having such a scope is, if maintainable, within sections 1781 and 1782 of the Code of Civil Procedure, and must be brought against the officers of the insurance company, and not against the company only. It is also within section 56 of the Insurance Law (Chap. 690, Laws of 1892), providing that proceedings for an accounting by a domestic insurance corporation can be taken only upon the application or approval of the Attorney-General, except in an action by a judgment creditor or in proceedings supplementary to execution; and it follows that only the Attorney-General or a judgment creditor of the company may bring the action.

Such a construction of the statute does not impair the obligation of the contract made between the company and its policyholders, in violation of section 10 of article 1 of the Constitution of the United States, as the statute is remedial only and prescribes a method of procedure by which the remedy may be made applicable to every person situated as is the policyholder in question.

FOLLETT and WARD, JJ., dissented.

APPEAL by the defendant, Mutual Reserve Fund Life Association, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Oneida on the 10th day of September, 1896, upon the decision of the court, rendered after a trial at the Oneida Special Term, overruling the defendant's demurrer to the plaintiff's complaint, and also from the order directing the entry of such judgment entered in said clerk's office on the same day.

William Kernan, for the respondent.

W. T. B. Milliken and *F. A. Burnham*, for the appellant.

ADAMS, J. :

The plaintiff, in his complaint, alleges that the action is brought on his own behalf, as well as on behalf of all other persons holding policies of insurance in the company of the defendant who may desire to join in the prosecution.

This complaint was demurred to by the defendant upon the following grounds, viz. :

"(1) That the said complaint does not state facts sufficient to constitute a cause of action.

"(2) That it appears upon the face of the complaint that the plaintiff has not legal capacity to sue, in that the action is not brought by the Attorney-General of the State of New York, nor by a judgment creditor of the defendant corporation; and in that it does not appear that the plaintiff has sought any relief for his alleged grievances within the said corporation; and in that it does not appear that he has requested any action to be brought by the officers of said corporation, or that they have refused to bring such action.

"(3) That it appears upon the face of the complaint that there is a defect of parties defendant, in that the acts and omissions therein alleged were the acts and omissions of the officers and

directors of the defendant corporation charged with the management of its affairs, and that none of such officers and directors are made parties herein."

The demurrer was overruled at the Special Term, and from the order overruling the same, as well as from the judgment entered thereon, the defendant appealed to this court.

In order that the questions raised by the defendant's demurrer may be intelligently discussed and properly disposed of, it is necessary to understand, if possible, not only the character of the relief which the plaintiff seeks to obtain by means of his action, but the precise allegations of the complaint upon which he rests his right to recover, an undertaking which is attended with no little difficulty in this instance, by reason of the prolixity of the pleader, who has drawn his complaint so informally and with so much reiteration as to render it somewhat uncertain upon just what facts he places his reliance.

Haply, in such an emergency, we are at liberty to invoke the general rule of pleading, that where a complaint is met by a demurrer upon the ground that it does not state a cause of action, the pleading thus demurred to will be held to state such facts as can be implied from its allegations by reasonable and fair intendment; and that the facts thus stated shall be deemed admitted by the demurrer. (*Sage v. Culver*, 147 N. Y. 241.) This rule, however, is not without its limitations, one of which is that facts only, and not the conclusions or inferences drawn therefrom by the pleader, are to be regarded as established by the interposition of the demurrer; and when, as in this case, the contract relied upon happens to be in writing and set forth at length in the complaint, the rights of the parties must be determined by its terms, as construed by the court, and not by the pleader. (*Buffalo Catholic Institute v. Bitter*, 87 N. Y. 250; *Bogardus v. N. Y. Life Ins. Co.*, 101 id. 328.)

Adopting, therefore, the rule thus stated for our guidance, and treating the policy of insurance attached to the plaintiff's complaint as a statement of the entire contract between the parties, we find, when considered in connection with the several alleged breaches of its conditions by the defendant, that the difficulty of which we have

been speaking is, in a measure, obviated, and that the cause of action which the plaintiff has attempted to set out, relieved of all surplus and redundant matter, may be briefly epitomized in the following allegations, viz. :

That the defendant, in and by the terms of its contract with the plaintiff, undertook and agreed from its net earnings to create and maintain a reserve fund, stipulating that when such fund should exceed a certain amount the surplus should be divided among the various policyholders or members of the association ; that in violation of this agreement the defendant has not only failed to properly create and maintain such reserve fund, but has diverted its net earnings to other purposes, and has not divided the surplus thereof in accordance with the agreement entered into between the parties ; and that upon this state of facts, the relief demanded is in substance that the defendant be required by the court to carry out and fulfill the terms of its contract in accordance with the terms thereof.

To all intents and purposes, therefore, the action may be treated as one for the specific performance of a contract of life insurance based upon the co-operative or assessment plan, and, consequently, it is one of which a court of equity will take cognizance (*O'Brien v. Fitzgerald*, 143 N. Y. 377), provided the facts thus alleged, giving to them all the force and value they are entitled to receive, can be said to constitute any cause of action in favor of this plaintiff, against the defendant, which we regard as extremely doubtful. (*Verplank v. Mercantile Ins. Co.*, 1 Edw. Ch. 87; *Karnes v. Rochester & Genesee Valley R. R. Co.*, 4 Abb. [N. S.] 107; *Bewley v. The Equitable Life Assurance Society of the United States*, 61 How. Pr. 344; *Uhlman v. N. Y. Life Ins. Co.*, 109 N. Y. 421.)

In the view, however, which we take of this case, it will not be necessary to pass upon this particular feature of it, inasmuch as we conclude that the interlocutory judgment must be reversed and the demurrer sustained, upon the ground that the plaintiff has no legal capacity to maintain the action in any event. Were the plaintiff a judgment creditor of the defendant, it is quite possible that a cause of action might be spelled out of the complaint in his favor within the authority of the cases last cited. But there is, of course, no pretense that he sues in that capacity, and it is, therefore, a little difficult to determine precisely what is his relation to the defendant,

although the trend of authority appears to be that it may be regarded as one of contract, measured by the terms of the policy. (*Cohen v. N. Y. Mutual Life Ins. Co.*, 50 N. Y. 610; *People v. The Security Life Ins. & Annuity Co.*, 78 id. 114.)

Without attempting, however, to determine this question, it is sufficient for our present purpose to say that the plaintiff brings his action simply as a policyholder or member of the defendant corporation, and although, as we have seen, he asks that a specific performance of the contract be decreed, it is obvious, from a mere casual reading of the complaint, that the relief sought cannot be obtained without requiring the defendant to account for the official conduct of its directors in the management and disposition of the funds and property of which they are the legal custodians. In other words, although not so alleged, the action is one which is necessarily founded upon the misconduct of the defendant's trustees, directors or managers, and consequently it is one within the contemplation of section 1781 of the Code of Civil Procedure, which must be brought against the officers of the defendant and not against the corporation only.

Furtnermore, such an action must be brought either by a creditor of the corporation — which means a judgment creditor — (*Belknap v. North America Life Ins. Co.*, 11 Hun, 283; *Cole v. The Knickerbocker Life Ins. Co.*, 23 id. 255) or else by the Attorney-General in behalf of the People of the State. (Code Civ. Proc. § 1782. *People v. Ballard*, 134 N. Y. 269.)

We think these provisions of the Code were obviously designed by the Legislature to provide a remedy and the means of obtaining the same for every person whose relation to a corporation entitles him to relief similar to that sought by the plaintiff through the medium of this action. If this be so, it follows that the remedy thus afforded, being adequate and complete, a separate and independent action is not maintainable by the plaintiff in his individual capacity.

And in this connection it is proper that allusion should be made to section 56 of chapter 690 of the Laws of 1892, known as "The Insurance Law," which reads as follows, viz.:

"§ 56. Proceedings for accounting, injunction or a receiver must be upon application of the Attorney-General.—No order, judg-

ment or decree providing for an accounting, or enjoining, restraining or interfering with the prosecution of the business of any domestic insurance corporation, or appointing a temporary or permanent receiver thereof, shall be made or granted otherwise than upon the application of the Attorney-General on his own motion or after his approval of a request in writing therefor of the superintendent of insurance, except in an action by a judgment creditor or in proceedings supplementary to execution."

Now, the relief asked for by the plaintiff in this action necessarily involves, in the event of his success, the entry of a judgment or decree which will require the defendant to abandon the practice and method upon which it is at present conducting its extensive business (*Seymour v. The Mutual Reserve Fund Life Assn.*, 14 Misc. Rep. 151); and it is difficult to see how he can obtain all the relief he demands, unless something in the nature of an accounting is required upon the part of the defendant. Indeed, in the 6th subdivision of the prayer of his complaint, he asks:

"That the total number of policyholders now living be *ascertained*, and the total amount paid by such policyholders to the Reserve Fund be *ascertained*, and the amount paid by the undersigned to the Reserve Fund be *ascertained*, and the undersigned be paid such amount of the Reserve Fund over and above \$1,000,000, in proportion to the amount he has contributed thereto as compared with the whole amount contributed by policyholders now living."

These several statutory provisions make it plain to our mind that it is the policy of the law that neither individual members nor creditors at large of a corporation shall be permitted to bring actions which shall in any material sense interfere with the system of corporate management adopted by the officers of such corporation, who, presumably and generally speaking, are the sole judges of the manner in which its business shall be conducted (*Boardman v. L. S. & M. S. Ry. Co.*, 84 N. Y. 157); but that, on the contrary, any such suit or action, when not brought by a judgment creditor, must be instituted and conducted in the name of the People and by the public prosecutor, the Attorney-General of the State.

In response to the contention that the possible effect of such a construction of the statute would be to impair the obligation of a contract and thus violate the provision of section 10 of article 1 of

the Constitution of the United States, it may be said that the whole scope and object of the statute is remedial only. That is, it furnishes a remedy and prescribes a method of procedure by which that remedy may be made applicable to every person situated as the plaintiff is. This much it was certainly within the province of the Legislature to do without violating any constitutional provision. (*Rexford v. Knight*, 11 N. Y. 308 ; *People v. Turner*, 117 id. 227 ; *New Orleans W. W. Co. v. Louisiana S. Co.*, 125 U. S. 18.)

We conclude, therefore, that, inasmuch as it is apparent that the judgment which the plaintiff is here seeking to obtain is one which will compel the defendant's officers to account for their official conduct, and that it is also one which will interfere with the prosecution of the defendant's business, the action is improperly brought, and the necessary result of this conclusion is, that the order and judgment appealed from should be reversed.

HARDIN, P. J., and GREEN, J., concurred ; FOLLETT and WARD, JJ., dissenting.

FOLLETT, J. (dissenting) :

This action, an equitable one, was begun May 8, 1893, to compel the defendant specifically to perform a contract of insurance.

The defendant admits that February 15, 1881, it executed and delivered to the plaintiff an insurance policy, which contains, among others, the following provisions :

"The net earnings of the Association, together with the sum received from each assessment as a Reserve, shall constitute a fund which shall be deposited with the Real Estate Trust Company of New York, and be securely invested in United States Bonds, Mortgages, or other interest-bearing securities, by said Real Estate Trust Company, as trustee, for the exclusive benefit of the members of the Association, and the interest on the same, as it accrues, shall be paid by the said trustee to the Treasurer of the Association.

"When the said Fund has reached the sum of \$100,000, should an assessment fail to produce a sufficient sum to pay a certificate in full, the deficiency shall be paid by the said trustee from the said Reserve Fund upon an order signed by the President and Treasurer of the Association. When the Reserve Fund shall amount to \$200,000, the interest earned on the same shall be paid as a dividend to those who

have been members for a period of five years in proportion to the rate fixed by the graduated assessment at each age of entry.

“When the Reserve Fund shall amount to \$1,000,000 (the limit), all future sums set aside for the reserve on each assessment shall be equitably divided among the members.”

The foregoing extract from the policy contains three express promises, every one of which the defendant admits it has violated, and it also admits that the plaintiff has performed the contract on his part. Among other relief asked for is that the defendant be compelled specifically to perform its contract. It is asserted that an action for such relief cannot be maintained by reason of the provisions of chapter 400 of the Laws of 1890 :

“Section 1. No order, judgment or decree, providing for an accounting, or enjoining, restraining or interfering with the prosecution of the business of any life or casualty insurance company, association or society of this state, or appointing a temporary or permanent receiver thereof, shall be made or granted otherwise than upon the application of the attorney-general, on his own motion, or after his approval of a request in writing of the superintendent of the insurance department, except in an action by a judgment creditor, or in proceedings supplementary to execution.”

This statute was repealed by chapter 690 of the Laws of 1892 — the Insurance Law — and section 56 of that act substituted, which provides :

“§ 56. No order, judgment or decree, providing for an accounting, or enjoining, restraining or interfering with the prosecution of the business of any domestic insurance corporation, or appointing a temporary or permanent receiver thereof, shall be made or granted otherwise than upon the application of the attorney-general, on his own motion, or after his approval of a request in writing therefor of the superintendent of insurance, except in an action by a judgment creditor, or in proceedings supplementary to execution.”

The accounting mentioned in the statute of 1890, and in section 56 of the Insurance Law, refers to a general accounting of the affairs of a corporation in an action brought in the interests of the public, preliminary to winding it up, or to restrain it from prosecuting its business in violation of the statutes. The term “interfering with the prosecution of the business” does not mean such an inter-

ference as will compel the corporation to perform its contracts, but it refers to regulating the conduct of its business so as to prevent it from violating its charter. It will not do to hold that a policyholder can obtain redress for a violation of his contract only through an action brought by the Attorney-General. The judgment demanded in this action will not restrain or interfere in the sense of the statute, with the defendant's prosecution of its business, but will simply compel it to perform its contract with the plaintiff.

If this statute is to be given as broad a construction as is contended for by the defendant, it would substantially deprive all policyholders of any remedy against the corporation, no matter to what extent their contracts might be violated. As to all policyholders whose policies antedate the statute, as the plaintiff's does, such a construction would be violative of the provision of section 10 of article 1 of the Constitution of the United States, which prohibits the enactment of laws impairing the obligation of contracts. Notwithstanding this constitutional limitation, a State may pass a statute changing remedies theretofore existing, but it cannot enact a law which will deprive a party of all remedy against the violators of contracts. But I apprehend that this statute was not intended to deprive persons with whom insurance corporations have made contracts from maintaining actions simply to enforce the performance of their contracts, even though the action may incidentally require an accounting.

The opinion of the learned Special Term, overruling the demurrer, and reported in 17 Miscellaneous Reports, 722, seems to me conclusive on the questions presented by this record, and the judgment should be affirmed, with costs, on that opinion.

WARD, J., concurred.

Interlocutory judgment and the order reversed, with costs, and demurrer sustained, with costs, with leave to the plaintiff to amend his complaint upon payment of the costs of the demurrer and of this appeal.

PATRICK H. McCARTY, Respondent, v. JOHN S. A. LAMBLEY,
Appellant.

Slander — privileged communications — words of a store manager, informed of a theft, spoken to the accused — the accused must show express malice — inconsistent charge upon the question of express malice and mitigation.

Where employees of a mercantile house have informed its manager, not a member of the firm, that another employee has stolen, and has admitted to them that he has stolen, property of the firm, the subsequent words of the manager, spoken in the presence of others, to the accused, charging him with theft and discharging him, while *prima facie* slanderous, are, in view of the confidential relations of the parties and of the interest of the manager and of his duty to his employers, to be regarded as privileged as matter of law, and the burden is cast upon the accused of showing express malice as matter of fact.

Where the question of express malice is submitted to the jury in an action for slander, and the court, after stating the necessity of express malice to a recovery, says, in treating of mitigation, in substance, that, if the jury find that the accusation was made in good faith, but under an honest mistake, they may take the honest mistake into consideration in reducing the damages, and subsequently refuses the defendant's request for a charge that if the manager made his statements in the honest belief of their truth, they were privileged, and an absolute defense was established, a new trial should be granted, as the legal effect of the charge is to instruct the jury that, although they might find that the words were spoken honestly, in good faith, they might also find that they were spoken maliciously.

APPEAL by the defendant, John S. A. Lambley, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Onondaga for \$250 damages and costs on the 1st day of May, 1896, upon the verdict of a jury, and also from an order entered in said clerk's office on the 19th day of May, 1896, denying the defendant's motion for a new trial made upon the minutes.

The plaintiff brings this action to recover damages for certain defamatory words alleged to have been spoken to and concerning him by the defendant.

The undisputed facts of the case, so far as it is necessary to detail them, are as follows:

The defendant, at the time the alleged slanderous words were uttered, was manager for the firm of D. McCarty & Co., which firm carried on a large wholesale and retail department store in the city

of Syracuse, and employed some 300 persons in the conduct of its business. The plaintiff, a young man twenty-two years of age, had charge of the bundle counter in this store, his duty being to receive from and deliver to the proper persons bundles of goods or other property placed in his charge.

Some time prior to July 10, 1895, one John J. Colwell, who was also in the employ of McCarty & Co., having charge of the hat, hosiery and furnishing department, took a straw hat from the hat counter. This hat was six and seven-eighths inches in size, of a peculiar shape and color, and the only one of that size, shape and color remaining in stock. He inclosed the hat in a paper bag, wrote his name upon the bag and sent it to the plaintiff's bundle counter to be retained there until called for.

On the tenth of July, George J. Barnard, a salesman in the store, sent a boy to the plaintiff's bundle counter for the hat. The boy did not return, but the plaintiff came to Barnard and Colwell with a book in his hand and had a conversation with them, after which he returned with a straw hat of the same size and color as the one delivered to him by Colwell. The hat was somewhat worn and soiled and the plaintiff admitted having worn it the night previous and also that morning. He delivered this hat to Colwell, and it was thereupon charged up to the plaintiff.

The evidence of both Colwell and Barnard is that the plaintiff admitted having taken the hat, and they both swore that they had seen him wearing it at different times. The plaintiff, however, denied having made the admissions to these persons which they testified to, and said that he found that some one had taken his hat and left this one in its place; that he thereupon appropriated the one left and wore it that night and the next morning, and that these were the only occasions of his wearing the hat.

But, without going further into the controverted evidence, it is only necessary to add that it is conceded that Colwell and Barnard reported the matter to the defendant and informed him that the plaintiff had admitted to them that he had stolen the hat. The defendant thereupon sent for the plaintiff, and in the presence and hearing of several other persons, charged him with theft, and dismissed him from service.

A day or two thereafter one James K. Mara, who was then a student in the law office of the attorneys of record for the plaintiff, went with the plaintiff to the store of McCarty & Co., and there had an interview with the defendant. Mara testified that he went at the instance of one of the plaintiff's attorneys; that he requested the defendant to allow the plaintiff to make an explanation, which request was refused, and that the defendant reiterated the charge that the plaintiff had stolen the hat.

Such further facts as are deemed important will be referred to later on.

Raymond Cobb, for the appellant.

Leonard T. Jones, for the respondent.

ADAMS, J. :

The words spoken by the defendant to the plaintiff during their first interview were unquestionably slanderous *per se*, and as they were spoken in the presence and hearing of third parties, they were manifestly actionable, unless they were either justifiable or privileged. The same may be said respecting the reiteration of the accusation to the witness Mara upon the subsequent occasion above referred to.

A defense of justification was interposed by the defendant, and evidence was given which tended very strongly to establish that defense. It was thought, however, by the learned trial court that there was sufficient controversy respecting it to raise an issue of fact, and this issue was duly submitted to the jury, and determined by them adversely to the defendant's contention. We must, therefore, regard their verdict as conclusive so far as that feature of the case is concerned.

We are thus brought directly to a consideration of the question of privilege, and in order to deal intelligently with that question it is desirable to understand precisely the relations existing between these parties as well as between them and their employers, and also the nature of the duties which these relations imposed upon them, or more especially upon the defendant who obviously occupied a position of great responsibility. He was charged with the executive management of a large mercantile establishment. Subordinate to him and subject to his control were upwards of 300 employees,

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for whose conduct and fidelity in the discharge of their duties he was in a measure responsible. His relation to his principals, as well as to his co-employees, was, therefore, highly confidential; and he would clearly have been remiss in the performance of his duty had he permitted a person, whom he had reason to believe dishonest, to remain in the service of the firm.

The plaintiff, as has been seen, was likewise an employee of McCarty & Co., but not of the same grade as the defendant. He was in a sense subordinate to the latter, and it is not disputed that the defendant had the right to discharge him for proper cause.

The circumstances of the case would seem, therefore, to bring into operation the rule that a person clothed with the authority, and charged with the delicate responsibilities which rested upon this defendant, may not only discharge a subordinate for dishonesty, but he may, with assurance of immunity from liability, state the reasons for his action, although they involve a charge of criminal conduct and that charge is made in the presence of third parties. Provided, nevertheless, that in so doing he acts in good faith and in the honest belief that the party against whom the charge is made was actually guilty of the crime charged.

Privileged communications have been defined by a text writer to "comprehend all statements made *bona fide* in performance of a duty, or with a fair and reasonable purpose of protecting the interest of the person making them, or the interest of the person to whom they are made. A communication made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty, although it contain criminatory matter, which, without this privilege, would be slanderous and actionable." (Townshend on Slander & Libel, § 209.)

The rule as thus stated has been frequently recognized and adopted by the courts in this State (*Keane v. Sprague*, 30 Alb. L. J. 283; *Klinck v. Colby*, 46 N. Y. 427; *Byam v. Collins*, 111 id. 143; *Hemmens v. Nelson*, 138 id. 517; *Pendleton v. Hawkins*, 11 App. Div. 602), and when applied to the undisputed facts of this case we think it required the trial court to hold, as matter of law, that what was said by the defendant to the plaintiff during the first interview was, *prima facie*, privileged. For, as has been stated, it

was conceded that the defendant had been informed by two of his subordinates that the plaintiff had not only stolen the hat, but that he had admitted his guilt. (*Klinck v. Colby, supra*; *Lovell v. Houghton*, 116 N. Y. 520.)

It is proper, however, that there should be no misapprehension as to the meaning of the term "privileged" as it is here used.

We have already stated that the words complained of are *prima facie* slanderous, and that, ordinarily, they would be regarded as inferentially malicious. When, therefore, we speak of them as "privileged," we simply mean that the circumstances in which they were used rebut the inference which would otherwise arise from their utterance. Or, in other words, that when their privileged character is established, as a matter of law, the burden is cast upon the plaintiff of establishing, as a matter of fact, the existence of express malice. (*Townshend on Slander & Libel*, § 209, *supra*; *Klinck v. Colby, supra*; *Byam v. Collins, supra*; *Lovell v. Houghton, supra*.)

The learned trial court appears to have adopted this view in submitting the case to the jury, and, so far as this particular feature of it is concerned, his charge leaves nothing to be desired. The jury, it is true, were permitted to determine the question of privilege as one of fact, but they were instructed that if they came to the conclusion that the words spoken were privileged, the plaintiff could recover no damages until he had proven that their utterance was accompanied by express malice. What constituted express malice was also very clearly and comprehensively stated, and it is not to be denied that there is some evidence in the case which, standing by itself, if deemed credible by the jury, may possibly have justified them in reaching the conclusion that the defendant had taken advantage of the particular occasion in question to give utterance to an unfounded charge.

It may be conceded, therefore, that not only was the question of express malice fairly in the case, but that it was also one of vital importance. It was, consequently, very desirable that the jury should have labored under no misapprehension as to the consequences of their deliberations.

After defining express malice, and stating to the jury the necessity of its existence in order to warrant a recovery by the plaintiff,

if they found that the words uttered were privileged, the learned trial court further instructed them as follows, viz. : "If you find that the justification has not been proved, and find that the communication was not privileged under the rules which I have laid down, then you come to the question of mitigating circumstances. Even though the accusation may not be true, even though the communication may not be privileged, yet, if you find the accusation was made in good faith, believing it to be true, made upon a lawful occasion, you will take those circumstances into consideration in mitigating the damages which the plaintiff might otherwise be entitled to recover at your hands ; take those circumstances into consideration in reducing the damages. For if he has made an honest mistake, with reasonable grounds to believe it to be true ; made the accusation in good faith, from honest motives, from a desire to protect himself and the firm of which he is manager from theft and wrong, and from no ill-will, no desire to injure the plaintiff, then, gentlemen, those circumstances are to be considered in reducing the damages which the plaintiff might otherwise be entitled to * * *."

This portion of the charge was excepted to by the defendant's counsel, who asked the court to charge that if the statements were made in the honest belief of their truth, the communication was privileged and would constitute an absolute defense.

This request was declined and the defendant again duly excepted. If the views to which we have given expression correctly state the law of this controversy, the refusal of the trial court to charge in accordance with this request places the case in this somewhat anomalous situation : The words complained of are *prima facie* privileged ; they are, therefore, not actionable unless accompanied by express malice in their utterance. Nevertheless the jury were permitted to infer from the refusal of the court to charge as requested, as well as from the language quoted from the body of the charge, that they might find them to have been spoken in perfect good faith and in the honest belief of their truth and yet spoken maliciously.

We do not see how these two propositions can possibly stand together. That is, how words can be spoken honestly and in perfect good faith, and at the same time be uttered maliciously. We conclude, therefore, that the request of the defendant's counsel was proper, and that the exception to the refusal of the court to charge

in accordance therewith presents error which is fatal to the plaintiff's recovery, and which is not cured by the remaining portions of the charge, admirable as they are.

We have thus far considered the case with reference to the original accusations made to the plaintiff at the time he was discharged; and it is perhaps proper that a word or two should be said respecting their reiteration at the time the plaintiff interviewed the defendant in company with the witness Mara on the thirteenth of June.

It is to be remembered that this interview was sought by the plaintiff for the purpose of discussing the question of his discharge; that Mara appeared in a semi-professional capacity, and as a representative of the plaintiff's attorneys to demand a retraction and reinstatement for his client, and that what was there said by the defendant was in reply to questions or demands made by Mara. We incline to the opinion, therefore, that the parties' relation towards each other was legally such as to bring any communications or statements made by either within the same rule to which we have already adverted. (*Billings v. Fairbanks*, 136 Mass. 177.) Or, to state the matter more concisely, that the statements made to Mara were privileged, to the extent of requiring proof of express malice in order to render them actionable. But it is not necessary to pass definitely upon this feature of the case, as we can see no escape from the consequences of the exception heretofore considered, and we, therefore, conclude that a new trial is rendered necessary.

Judgment and order reversed and a new trial ordered, with costs to abide the event.

All concurred, except FOLLETT and WARD, JJ., not voting.

Judgment and order reversed and a new trial ordered, with costs to abide the event.

In the Matter of the Application of THE GRADE CROSSING COMMISSIONERS OF THE CITY OF BUFFALO to Appraise Certain Lands of BETSEY SULLY CHICK and Others.

BETSEY SULLY CHICK, Appellant, v. THE GRADE CROSSING COMMISSIONERS OF THE CITY OF BUFFALO, Respondent.

Additional allowance — it cannot be given in proceedings under the Buffalo Grade Crossing Act.

An owner of land in Buffalo, whose property has been taken in a street widening proceeding by the city grade crossing commissioners appointed under chapter 345 of the Laws of 1888, cannot be granted an extra allowance under section 12 of that act as none is thereby expressly provided for, and, the matter being a special proceeding, its costs are controlled by section 3240 of the Code of Civil Procedure, a section making no provision for extra allowances.

Nor can such an owner recover such an allowance under the Condemnation Law (§ 3372 of the Code of Civil Procedure),

First, as the Grade Crossing Act in question was passed some two years before the Condemnation Law, and there is nothing in the latter act to indicate that it was intended to apply to the Grade Crossing Act.

Second, as amendments to the Grade Crossing Act, regulating costs and taking effect on the same day with, and also after the passage of, the Condemnation Law, do not refer to the Condemnation Law, and

Third, as the two acts are not *in pari materia*, as the purposes of the Grade Crossing Act could not be accomplished by proceedings under the Condemnation Law.

APPEAL by Betsey Sully Chick from so much of an order of the Supreme Court, made at the Erie Special Term and entered in the office of the clerk of the county of Erie on the 22d day of March, 1897, confirming the report of the commissioners in this proceeding, as denies her application for an extra allowance for costs on the ground that there was no authority or power vested in the court for the granting of such allowance.

This proceeding was instituted by the grade crossing commissioners of the city of Buffalo under the provisions of chapter 345 of the Laws of 1888 to condemn a parcel of land owned by the defendants for the purpose of widening one of the streets of the city. The proceeding appeared to have been in all respects properly conducted, and, upon the motion at Special Term to confirm the award of damages, an application was made by the defendant Chick for an addi-

tional allowance of costs. The application was denied, and from the order denying the same this appeal is brought.

John Laughlin, for the appellant.

Daniel H. McMillan, for the respondent.

ADAMS, J. :

The appellant's property having been taken for a public improvement, it is manifestly just and fair that she should not only be reasonably compensated therefor, but that she should be indemnified against all costs and expenses which she has incurred in her efforts to obtain adequate and proper damages for the property thus appropriated. (*Matter of the City of Brooklyn*, 148 N. Y. 107.) Indemnity by way of costs is, however, not an inherent right. It is rather one which is created by statute, and can only be obtained in cases which are clearly brought within the operation of existing statutory provisions. (*Fargo v. Helmer*, 43 Hun, 17; *Munson v. Curtis*, Id. 214; *Patterson v. Burnett*, 17 Civ. Proc. Rep. 116.) It follows, therefore, that, unless there is some statute awarding costs and expenses to the appellant, none can be recovered by her. (*In re City of Brooklyn*, *supra*.)

Section 12 of the act under which these proceedings were instituted provides that, upon the confirmation of the report of the commissioners, "The court shall fix the amount of damages, costs and expenses allowed by law, to be allowed the landowner and the petitioner, and shall order the same to be paid," etc.

It is obvious, therefore, that provision was made by the Legislature for the awarding of costs in this particular proceeding, but as the amount to which the appellant is entitled is, unfortunately, left somewhat indefinite, the duty is imposed upon us, by her appeal, to determine what construction shall be given to the language just quoted.

It appears to be pretty well settled that this is what may be denominated a "special proceeding," as that term is defined by the Code of Civil Procedure (§ 3334; *In re Brooklyn*, *supra*), and it seems equally well settled that, in the absence of some express statutory direction, the costs to be awarded to the successful party in a special proceeding are fixed by section 3240 of the Code of Civil

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Procedure; that they are limited in amount to the "rates allowed for similar services in an action in the same court," and do not include anything by way of "extra allowance." (*In re Holden*, 126 N. Y. 589.) It is insisted, however, that inasmuch as the appellant is entitled to such costs and expenses as are "allowed by law," she may avail herself of a provision of the General Condemnation Law, which provides that in proceedings instituted under that act the court shall, in the final order, direct that the defendant recover of the plaintiff the costs of the proceedings, and that it may also, in its discretion, grant an additional allowance of costs, not exceeding five per centum upon the amount awarded. (Code Civ. Proc. § 3372.)

Upon the argument we were not a little impressed with the apparent soundness of this proposition, which is certainly sustained by two Special Term decisions, each of which is entitled to great respect (*Matter of Slade*, 19 Misc. Rep. 230, and case there referred to); but after a more careful examination of the question we have found it necessary to revise our first impressions and to conclude that the section just cited cannot properly be invoked in aid of the appellant's contention.

In reaching this conclusion we have been influenced by two considerations, which may be thus briefly stated: The act authorizing these proceedings is special in its character, and it was passed in 1888, some two years prior to the enactment of the General Condemnation Law. During this period of time there was consequently no law regulating the amount of costs to be awarded the appellant other than section 3240 of the Code of Civil Procedure, and although section 3372 might have been sufficiently comprehensive in its operation to have related to the special act, if the Legislature had so ordained, yet there is nothing to indicate that such was the intention of that body. On the contrary, if we apply the ordinary rules of construction, we are led to the conclusion that such was clearly not its intention. For upon the very day that the general law went into effect, section 12 of the special act was amended, and the exact language of the original act respecting the allowance of costs was retained, without any reference whatever to the provisions of the general law (Laws of 1890, chap. 255), and two years thereafter the special act was again amended, without containing any such refer-

ence. (Laws of 1892, chap. 353.) These omissions seem to be quite significant, for it is but reasonable to suppose that if the Legislature had intended to make any of the provisions of the general act applicable to the special act which we are now considering, it would have clearly indicated such intention, either in the general act or in one of the other of the amendments to the special act to which reference has been made.

But a still more formidable obstacle, in the way of the adoption of the defendant's contention, is that the two acts are not so related as to make them *in pari materia*.

As was said in the case to which we have adverted so frequently (*In re City of Brooklyn, supra*), if "the purpose of the special act could have been accomplished by proceedings under the general act, the procedure under the general act might have been followed by force of section 3383 of the Code, although the prior special act furnished a method of its own."

We do not think, however, that the purposes of the Grade Crossing Act could have been accomplished by the General Condemnation Law. Both statutes relate to condemnation proceedings, it is true, but in this case, as in the one cited, each statute is complete in itself and "prescribes a system of procedure, each for itself, having many points of similarity, as also many points of divergence." In this case, therefore, as in that, it may be said that "the costs and allowances authorized in condemnation proceedings under the Code, by fair intendment, relate to costs and allowances in proceedings thereunder," and not to the costs and proceedings allowed by this special act.

It is to be regretted that the conclusion we have reached has been found necessary in this particular instance, for the defendant's application strikes us as a meritorious one. But if we are correct in our views, the difficulty which we have pointed out, and which does not appear to have been brought to the attention of the Special Term, is one which must be obviated by legislation and not by adjudication.

The order should be affirmed, but without costs to either party.

All concurred.

Order affirmed, with ten dollars costs and disbursements.

CHARLES FLAHERTY, Plaintiff, v. THE CONTINENTAL INSURANCE
COMPANY, Defendant.

Fire insurance — where the adjuster of the company denies all liability, the insured need not furnish proofs of loss — estoppel.

The declaration of an agent, appointed by an insurance company to adjust a loss occurring under a New York standard policy of fire insurance, made to the insured, to the effect that the company was not liable at all in the matter because of the invalidity of a vacancy permit, the premises having been unoccupied at the time of the fire, excuses the insured from furnishing the proofs of loss required to be furnished by the policy.

In such a case the company is estopped from setting up, as a defense to an action upon the policy by the insured, provisions of the policy requiring that none of its conditions shall be waived except by a written agreement indorsed thereon or added thereto.

MOTION by the plaintiff, Charles Flaherty, for a new trial upon a case containing exceptions, ordered to be heard by the Appellate Division in the first instance, and upon a nonsuit granted by the court after a trial at the Livingston Trial Term on the 6th day of May, 1896.

On the 23d day of August, 1893, the defendant issued a policy of insurance to the plaintiff, by the terms of which it insured him for the term of three years against loss or damage by fire to an amount not exceeding \$1,500, upon his two-story frame house, celery house, barn and contents, all situate in the town of Leicester, county of Livingston and State of New York.

The policy was of the standard form and contained the usual provision that within sixty days after the occurrence of a fire, unless the time was extended by the defendant, the plaintiff should render a statement to the defendant, signed and sworn to by him, stating his knowledge and belief as to the time and origin of the fire, and his interest and that of all others in the property, the cash value of each item thereof and the amount of loss thereon, and all incumbrances and other insurance, whether valid or not, covering any of the property insured. It was further stipulated that the policy was made and accepted subject to the conditions therein contained, together with such other provisions or conditions as might be indorsed thereon or added thereto.

Among the conditions in subjection to which the policy was accepted, was the following, viz.: "No officer, agent, or other representative (of the company) shall have such power (to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement endorsed hereon and added hereto. And as to such provisions or conditions, no officer, agent or other representative shall have such power, or be deemed or held to have waived such provisions or conditions), or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto; nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

The dwelling house mentioned in the policy was unoccupied, and while vacant, and on the 11th day of August, 1894, it was totally destroyed by fire. Notice of the fire was forthwith given to the local agent of the defendant, who thereupon made a personal examination of the premises and informed the defendant of the loss. This information was conveyed by letter, and to this letter the agent received a reply from the defendant in which it was stated that: "The matter has been referred to our adjuster, Mr. R. H. Dolson, whose address is Middletown, N. Y. * * * If not already done, notify us and the adjuster above named probable amount of our loss," etc.

Shortly after the receipt of this letter, Mr. Dolson arrived at Mount Morris, where the plaintiff resides, and had an interview with him. In the course of the negotiations for adjustment which thereupon took place between the parties, the plaintiff asked Dolson when the company would pay the loss. Dolson replied that the company had no liability in the case, for the reason that the vacancy permit was not binding. Upon receiving this information the plaintiff stated that, if such was the case, it would have to be settled in the courts, to which Dolson replied that that was his course. Thereupon this action was brought, and no proofs of loss were furnished the defendant either before or after bringing the same.

W. I. Van Allen, for the plaintiff.

Myron H. Peck, Jr., for the defendant.

ADAMS, J. :

By the terms of the defendant's contract of insurance, as expressed in its policy, the furnishing of proofs of loss by the plaintiff was undoubtedly a condition precedent to the latter's right to recover, and his omission to furnish the same within the prescribed time would, generally speaking, work a forfeiture of the contract. (*Sergent v. The L. & L. & G. Ins. Co.*, 85 Hun, 31.) This requirement, however, is one which was inserted in the policy for the exclusive benefit of the defendant, and unquestionably it had the right to waive its performance. The single question, therefore, which this court is called upon to decide is, whether the evidence, upon the part of the plaintiff, establishes such a waiver.

It appears, and it is not disputed, that soon after the fire the defendant's adjuster announced to the plaintiff that the defendant would not pay the loss upon the grounds of non-liability, and this denial of liability was explicit and unqualified. If, therefore, this statement may be treated as emanating from the company itself, and not from one who represented it merely in the capacity of an agent, the denial of liability was equivalent to a declaration on the part of the defendant that it would not pay the plaintiff's loss, even if the proofs were furnished, and consequently it was tantamount to a waiver of the condition requiring such proofs to be furnished. (May on Ins. 573, 574; *Lang v. Eagle Fire Co.*, 12 App. Div. 39, and cases there cited.)

In determining, therefore, how far the defendant is bound by the declaration of Dolson, it is important to bear in mind the circumstances under which he assumed to act for, and the apparent authority with which he had been clothed by, the company. It is undisputed that he was sent by the defendant to inquire into the plaintiff's loss, with full authority to adjust the same. What does this imply? The definition of the verb "adjust," is thus given in the Century Dictionary, viz., "to settle or bring to a satisfactory state, so that parties are agreed in the result; as to adjust accounts." And, if to adjust is to settle, an "adjuster" is, of course, a person who makes the adjustment or settlement.

The defendant informed its local agent at Mount Morris that the matter of the plaintiff's loss had been referred to their adjuster, Mr. R. H. Dolson. It would seem, therefore, that when this gentleman

reached Mount Morris he was accredited to this plaintiff as fully authorized and empowered to adjust and settle his loss, and if so, it follows, by implication at least, that his authority was sufficient to enable him to take any and every step which he deemed necessary or proper to facilitate an adjustment. Had he stated to the plaintiff that he was satisfied with respect to his claim, and that, therefore, it would be unnecessary for him to furnish any proofs of loss, can it be doubted that the plaintiff would have had a right to rely upon such an assurance and would have been justified in omitting to take any further steps to establish his claim? And if this be so it would seem equally clear that when he declared that the company was not liable in any event, his declaration was binding upon the company, because in making it he was in fact the company, and the plaintiff had the right to so regard him and to act accordingly.

Since the adoption of the standard policy in this State many important questions have arisen, the decision of which has produced some apparent confusion and conflict in the law of insurance. There is, however, one rule which seems to be pretty well established, and that is, that where a contract of insurance contains a provision that it shall not be changed, except by an agreement indorsed upon the policy by a duly authorized agent or officer of the company, an agent who possesses the power of his principal, either actually or apparently, may, by his conduct, estop his principal from enforcing such a provision against a party who has acted in reliance upon such conduct. (*Messelback v. Norman*, 122 N. Y. 578; *Bishop v. Agricultural Ins. Co.*, 130 id. 488; *Manchester v. The Guardian Assurance Co.*, 151 id. 88.)

We think that this case fairly falls within this rule, and that it may be said that the defendant is estopped from questioning the authority of its representative to waive a strict compliance with the requirements of the contract, for the reason that it sent him to the plaintiff clothed with apparent authority to take every necessary and proper step to adjust and settle his loss, and that when the adjuster declared that the defendant would not pay anything whatever until compelled so to do by a legal adjudication, the plaintiff had a right to rely upon that assurance as well as upon the apparent authority of the adjuster to give it, and he consequently had the right to bring his action forthwith, without first going through what,

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in the circumstances of the case, would have been the mere idle ceremony of furnishing proofs of loss.

We conclude, therefore, that the judgment of nonsuit in this case was improperly granted and that a new trial should be directed.

All concurred.

Motion granted and a new trial ordered, with costs to abide the event.

GEORGE E. PARISH Appellant, v. ARTHUR P. ROGERS, Respondent.

Lease of agricultural lands for a life — not invalid until after the expiration of twelve years.

A lease of agricultural lands within the State of New York, which, by its terms, continues during the natural life of the lessor and of his wife, and by which an annual rent is reserved, is not rendered invalid by the provisions of section 13 of article 1 of the Constitution of the State of New York, certainly until the expiration of the twelve-year limit fixed by said provision of the Constitution. FOLLETT and ADAMS, JJ., dissented.

APPEAL by the plaintiff, George E. Parish, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Genesee on the 8th day of September, 1896, dismissing the plaintiff's complaint upon the merits, with costs, after a trial at a Trial Term in Genesee county, before the court, a jury trial having been waived.

On the 25th day of February, 1888, one Elisha H. Parish executed and delivered to the defendant a lease or grant of certain agricultural lands, which, by its terms, runs during the natural life of the lessor or grantor, and of his wife, reserving an annual rent of \$300, payable quarterly during his lifetime, and at his death to his widow during her natural life. The grantor died in 1889, leaving a last will and testament by which he devised said lands to the plaintiff. The wife of the grantor was still living at the time of the trial of this action. In April, 1896, the plaintiff commenced an action for the recovery of the possession of said lands, based upon the ground that said lease or grant was made in contravention of the provisions of section 13, article 1 of the Constitution, and was,

therefore, null and void. "No lease or grant of agricultural land, for a longer period than twelve years, hereafter made, in which shall be reserved any rent or service of any kind, shall be valid."

Bowan & Washburn, for the appellant.

M. H. Peck, Jr., for the respondent.

GREEN, J. :

The precise question for determination, broadly stated, is whether the creation of estates for life in agricultural lands, with a reservation of rent, are prohibited by the Constitution; in other words, whether the instrument of grant or lease creating such an estate is void *ab initio*. In ascertaining the true interpretation of this constitutional provision and in determining the extent or limits of its operation, we may be assisted in arriving at a just conclusion by a statement of certain general principles.

In *Settle v. Van Evrea* (49 N. Y. 280, 285) the court held that the restriction against certain judicial officers acting as referees did not apply to "Commissioners of Appeals" because the clause in the Constitution there under consideration did not, by its terms, literally include those officers, though the same reasons must have existed for including the commissioners in the prohibition which were applicable to the Court of Appeals proper. ALLEN, J., stated the true principle of interpretation to be observed, in these words: "If, to meet exigencies and to prevent mischiefs, it is allowable sometimes to depart from the strict letter of a law and imply an intent not clearly expressed in the construction of ordinary statutes, which may be framed in haste and with none of the formalities that attend the preparation and adoption of a State Constitution, it would be dangerous in the extreme to extend the operation and effect of a written constitution by construction beyond the fair scope of its terms, merely because a restricted and more literal interpretation might be inconvenient or impolitic, or because a case may be supposed to be, to some extent, within the reasons which led to the introduction of some particular provision plain and precise in its terms.

"That would be, *pro tanto*, to establish a new Constitution, and do for the people what they have not done for themselves. The terms

of the instrument being clear and free from doubt, and having a well-understood meaning and application, the better way is to stand upon the maxim *ita lex scripta est*, and leave any supposed defect or omission to be remedied by the people or by legislation. * * *

"The prohibition is simple and direct, contained in a single paragraph, the terms of which are apposite, conveying a distinct and definite idea, and if they are extended, it can only be done by conjecture as to the possible intent of the framers of the clause, and upon a theory as to some policy supposed to be shadowed forth. The effect of the prohibition cannot be enlarged by conjecture or implication." (See, also, *People ex rel. Williams v. Dayton*, 55 N. Y. 367, 375; *Countryman v. Norton*, 21 Hun, 17, 19.)

If a lease or grant of an estate for life is to be judicially declared to be one "for a longer period than twelve years," and, therefore, obnoxious to the constitutional limitation, such adjudication must be founded, not upon the particular words or terms in which the prohibition is expressed, but rather upon some supposed principle of public policy. Or, in other words, that such a grant comes within the spirit of the provision, though not within the letter. But the application of such a principle of interpretation to a constitutional or statutory provision of this character, restricting, as it does, the right of free alienation of property, is not proper. The right of alienation being a fundamental right, it is subject only to such restrictions and limitations in its exercise as the Constitution may prescribe, either in express terms or by clear and necessary implication, or to such restrictions as the Legislature, acting within its constitutional powers, may deem proper to impose for the public good. A particular prohibition upon the free alienation of property cannot be extended or enlarged beyond the terms in which the restriction is expressed by the application of any rule of liberal interpretation. On the contrary, the provision must be made to bear a restrictive interpretation, and be limited in its operation and effect by the language employed. If we hold that an estate for life is, *per se*, an estate exceeding twelve years in duration, and, therefore, void, it follows that such estates in agricultural lands, with a reservation of rent, are entirely abrogated, and the owner of property is prohibited from creating such an estate, either for his

own life or that of another. The only way to avoid the constitutional restriction would be to declare that the estate should cease at the expiration of twelve years if the grantor or grantee (as the case may be) should then be living. The same result may well be accomplished by giving effect to the constitutional provision that the grant or lease shall *no longer* be valid after twelve years, and by judicially declaring that *thereupon* the grant shall be void and the rent reserved shall cease. That upon the expiration of that period the reciprocal obligations of the parties are annulled by operation of law, the grantor is entitled to his land, and the grantee is free from the payment of rent. It will be observed that there is no declaration of intent to abrogate grants of life estates in agricultural lands in which rent or service of any kind shall be reserved; and since the *creation* of such estates is not prohibited, either in express terms or by necessary implication, it ill becomes the judiciary to declare such prohibition upon a mere presumption of intention nowhere indicated in the Constitution. The purpose of the enactment was not to interdict the creation of such estates, but to limit the period of time beyond which they shall not extend. Where the term is specified in the lease and exceeds the limitation, it is void *per se*; but where it is left indefinite and its termination depends upon the contingency of death, which may happen within the period of limitation, it cannot be said to be void *ipso facto*, as being made for a period longer than twelve years. *Non constat* but that the estate will terminate within the period. It does not appear, therefore, from the terms of the grant that it will last longer than twelve years. In respect to whether the grant is void upon its face, the words "longer period" should be construed as meaning a definite period, and as not applicable to estates whose duration is wholly indefinite and uncertain in its duration. This grant is not, *by its terms*, a lease "for a longer period than twelve years," but for an indefinite time, which can only be made definite or fixed by the happening of a contingency, viz., death, which may occur within the limitation. The instrument cannot, therefore, be said to create a term for a longer period than twelve years within the meaning of the provision. The word "period" may mean an indefinite time, as well as a time specified, but it cannot have that meaning here, for the word relates to a specified period, and this grant is for an

indefinite time, which may expire within the period beyond which it cannot continue in legal operation or effect. The purpose intended to be accomplished, or the mischief designed to be remedied or obviated by this enactment, viz., to prohibit the reservation of rent or service upon leases for long periods of years, may be sufficiently effectuated by upholding the validity of the life estate created until the time limited arrives, when the obligation to pay rent shall cease.

The learned judge (SPRING, J.) who delivered the opinion in the court below, well says, that the instrument itself does not, in express terms, come within the prohibition of the Constitution. The term may extend beyond the restricted period, or it may expire before that time. The provision curtails the rights of owners of estates. It places a restriction upon the disposition of their property. And in order to make this curtailment, this restriction, effective, the instrument itself should clearly come within the pale of the inhibition. That the court cannot hold as matter of law that this instrument will extend for a longer period than twelve years. Its termination depends upon providential interposition and not upon the volition of the parties, so there was no attempt to violate the Constitution *al interdict*, as in some of the cases. Now, since the creation of life estates is not prohibited, the only effect the constitutional provision can have upon them is to limit their duration to a period beyond which they shall not extend.

The decisions under the clause of the Statute of Frauds, declaring void every parol agreement that by its terms is not to be performed within one year, have some application to this case by way of analogy. Where the time of performance was made to depend upon the contingency of death, and though that did not in fact occur within twenty years, it was held not within the condemnation of the statute. (*Kent v. Kent*, 62 N. Y. 560.)

And a verbal contract to build and maintain a switch for plaintiff's benefit, for shipping purposes, "so long as he needs it," is not within the statute, nor is it a grant of "an estate * * * for a term of more than one year, in lands and tenements," or a "contract for the sale of real estate or the lease thereof for a longer term than one year," within the Texas Statute of Frauds. (*Warner v. Texas & P. Ry. Co.*, 164 U. S. 435.)

In the case cited *GRAY, J.*, writes an elaborate opinion reviewing many of the authorities.

The principle upon which all these adjudications rest might well be invoked in support of the proposition that life estates do not come within the condemnation of a provision limiting the duration of estates for years; in other words, that the specification of a time certain does not prohibit in any manner the creation of estates for a time uncertain, and that such estates are valid and continue in operation until the happening of the contingency upon which they are made to depend, even though they should extend beyond the period limited. It is sufficient for the purposes of a decision, however, to hold that the provision is but a limitation upon the duration of the life estate, and not one that annuls the instrument of grant or lease by which it is created.

Reference may properly be made to the proceedings and debates in the Constitutional Convention of 1846. Mr. Brundage, one of the delegates, moved to insert after "years" the words "or natural life of the grantee," and made this observation: "The right to dispose of one's property during one's own life was a right which was inalienable, and which he would not divest himself of or others." The proposed amendment was negatived by a decisive vote—seventy-six to four. It is difficult to comprehend what was the particular purpose of the amendment, or what were the reasons that actuated the delegates in refusing to adopt it. The effect of it would be to extend the duration of the estate beyond twelve years, if the lessee or grantee should so long survive. Was that the reason why the amendment was rejected—with the intention that the provision should stand as a limitation of all life estates, whether for that of the grantor or the grantee? Or was it rejected because its effect would be to prevent an owner of agricultural lands from creating an estate for his own life, and *that* the convention did not propose to do? Or, in other words, that the creation and duration of life estates should not be affected? That the convention should remain silent upon that subject? That legislation respecting chattels real must necessarily be construed to be applicable to freehold estates, either as prohibiting their creation or as a limitation upon their duration?

This, I believe, is the first instance, in the history of the law, of

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an attempt by legislative act to limit the duration of an estate of freehold by a term of years. It is inconceivable that the convention should have intended to abrogate or limit freehold estates without making any mention of them in a provision impairing the free disposition of property. It should be observed here that Mr. Brundage's remark is charged with ambiguity. He says he would not restrict the right of one to dispose of his property during his own life, and yet that was what he proposed to do by the amendment offered, for the effect of it would be to prevent the creation of an estate that would continue for the life of the creator. It is evident, however, that *he* did not understand that the original provision affected life estates in any manner.

In *Stephens v. Reynolds* (6 N. Y. 454) it was held that a lease for life, conditioned that the lessee should occupy the land and support the lessor for life, was not within the constitutional inhibition.

In *Parsell v. Stryker* (41 N. Y. 480) there was a lease for life, with an agreement to work the premises on shares, and the court held that, as no rent, as such, was reserved, the lease was valid.

It is true that the court was not called upon in those cases to *decide* that a life estate, with a reservation of rent or service, came within the condemnation of the Constitution, as well as an estate for years — since it was determined that there was *no* reservation of rent or service — yet the opinions of the judges indicate that it was their understanding that the Constitution was intended to apply to estates for life, and the opinions of those eminent judges are entitled to much consideration, and especially so as to RUGGLES, Ch. J., who was a member of the convention and concurred in the opinions in 6 New York, 454. In deference to these opinions we are constrained to hold that estates for life are affected by the Constitution. Still, it by no means follows that life estates in such lands were intended to be abrogated, and since there is no declaration to that effect, the Constitution may properly and rightly be construed to operate simply as a limitation upon the period of their continuance. It is neither declared that leases for life shall be void, or shall not be valid, or that they shall not be created in respect of agricultural lands. Nor is it declared that all leases shall be for a term of years, and not otherwise created. And, in analogy to the rule respecting legislative acts, we are not at liberty to declare the grant void,

because in our opinion it is opposed to a *spirit* supposed to pervade the Constitution, but not expressed in words. (Cooley Const. Lim. [5th ed.] p. 205.)

It is unnecessary to allude to the provisions of the Revised Statutes respecting suspension of power of alienation beyond two lives in being, or as to remainders on successive estates for life beyond two lives. I do not perceive that these provisions have application to *reversions*. The latter provision only speaks of *remainders* limited on successive life estates, and I do not find a provision restricting the power to make a lease depending, say, upon the life of the lessor, his children, issue or descendants, etc. In the latter instance, is the absolute power of alienation suspended, even if it is expressly made to last as long as the life of the survivor of half a dozen lives? Since the fee may always be conveyed subject to the life estate. (See Chapl. Susp. Alien. 129, 1-3; *Purdy v. Hayt*, 92 N. Y. 451.)

We conclude, therefore, that the public policy declared by the Constitution will not be violated by giving effect and operation to the life estate created until the expiration of the period limited by the Constitution.

The judgment, therefore, should be affirmed, with costs.

HARDIN, P. J., concurred, with opinion; WARD, J., concurred; FOLLETT, J., dissented, with opinion in which ADAMS, J., concurred.

HARDIN, P. J. :

On the 25th day of February, 1888, Elisha Parish was the owner of the premises described in the complaint. On that day he executed a lease to Rogers, the defendant, which was "for and during the term of the natural life of the party of the first part and his wife, Cynthia Parish, from the first day of April, 1888, which term will end when the natural life of Elisha H. and Cynthia Parish terminates and ends."

The inhibition of article 1, section 13, of the Constitution is against the execution of a lease or grant of agricultural lands "for a longer period than twelve years." The period mentioned in the lease may not be twelve months. From the terms of the instrument itself it cannot be demonstrated that it will carry to the lessee the right to occupy "for a period longer than twelve years." How-

ever, if it be said that the lease was against the literal language of the constitutional provision, then it was void in its inception. That being so, the lessor and testator was the owner of the land at the time of the execution of his will and at the time of his death, which occurred on the 14th day of March, 1889. His will was dated on the 25th day of July, 1888. In the will of the testator, in which he gives to his son George, the plaintiff here, the land described in the complaint, the testator asserts his ownership of the lands, and that they are occupied and carried on by Rogers, and that the rent is to be paid to Cynthia Parish, the wife of the testator, after his death. And he supplements that declaration by saying in his will, viz.: "And as she is to have the said rent as therein specified." It is manifest that it was the intention of the testator that his wife, Cynthia, should enjoy the use of the premises during her natural life. It may be such enjoyment and occupation will fall short of twelve years.

In *Hart v. Hart* (22 Barb. 606) it was held that a lease of agricultural lands for twelve years, "with a covenant of renewal for twelve years longer if the lessor shall live," was good for the first twelve years.

In the course of the opinion delivered in *Clark v. Barnes* (76 N. Y. 304) it was said, in speaking of the constitutional provision, viz.: "This provision condemns all leases for a longer period than twelve years. A lease for a longer period than that would not be valid for twelve years, but the lease itself would be void *in toto*." In that case a stipulation had been entered into to execute two leases of the same farm, one for eight years and another for twelve years from the termination of the first, and the two leases were construed together, and, therefore, it was declared that they were both void inasmuch as they, in terms, provided for a period beyond that mentioned in the constitutional restriction.

To allow the plaintiff to recover possession of the lands would defeat the intention of the testator.

Under the circumstances of this case I am inclined to vote for an affirmance.

FOLLETT, J. (dissenting):

This action (ejectment) was begun April 13, 1896, to recover a farm in the possession of the defendant. There is no dispute about

the facts. February 25, 1888, Elisha H. Parish was the owner in fee of a farm containing about 114 acres situate in the town of Bergen, and on the date mentioned he, as party of the first part, and Arthur P. Rogers, the defendant, as party of the second part, executed a lease, under seal, by which Parish leased to Rogers said farm "for and during the term of the natural life of the party of the first part and of his wife, Cynthia Parish, from the first day of April, 1888, which term will end when the natural life of Elisha H. and Cynthia Parish terminates and ends. And the said party of the second part covenants that he will pay to the party of the first part for the use of said premises the yearly rent of three hundred dollars, to be paid quarterly every three months during said term, said rent to be paid to Elisha H. Parish during his lifetime, and after his death to the said Cynthia Parish, his widow, if she be still living, during her natural life."

Under this lease the defendant took possession of the premises and now occupies them. March 14, 1889, Elisha H. Parish died leaving a last will and testament, executed July 25, 1888, duly probated March 18, 1889, by which he devised this farm to his son, the plaintiff, in fee.

It is conceded that the premises leased are agricultural lands and that Cynthia Parish is living. The first and principal question involved on this appeal is whether the lease is void under section 13 of article 1 of the Constitution of this State, which provides:

"§ 13. No lease or grant of agricultural land, for a longer period than twelve years, hereafter made, in which shall be reserved any rent or service of any kind, shall be valid."

It was held by the court below, and it is urged on this appeal, that as the lease was for two lives in being at the date of its execution, and not in terms for more than twelve years, it is not violative of the Constitution, because it may terminate within twelve years from the date of its execution by the death of both persons upon whose lives the term is limited.

This position is subversive of the spirit and purpose of the section of the Constitution above quoted. Before the adoption of the Constitution of 1846 it was the custom of the owners of large landed estates to grant perpetual leases, called leases in fee, reserving rent, which endured so long as the rent was paid, and also leases reserv-

ing rent during the lives of two or more persons mentioned in the leases. The troubles between landlords and tenants under such leases in many counties of the State, immediately preceding the Constitutional Convention of 1846, culminating in what is known in the history of the State as the anti-rent war, was one of the principal reasons for calling that convention.

That it was the purpose of the convention to prohibit the granting thereafter of leases of agricultural lands, reserving rent, either in perpetuity or for lives, is, as I think, conclusively shown by the proceedings of that body. Among other committees appointed by the convention was No. 18, "On the Creation and Division of Estates in Lands," of which Judge SAMUEL NELSON was chairman, but owing to his absence during a large part of the session of the convention Judge IRA HARRIS became the acting chairman. This committee reported in favor of limiting leases of agricultural lands to a period of ten years. Mr. Benjamin S. Brundage, of Steuben, who opposed, throughout the convention, any limitation upon the right of landowners to lease their lands, moved to amend the section as reported by inserting after the word "years" the words "or natural life of the grantee." It would seem that the word "grantee" is a misprint for "grantor," for, in support of his proposed amendment, Mr. Brundage said: "The right to dispose of one's property during *one's own life* was a right which was inalienable, and which he would not divest himself of or others." (Debates Const. Conv. 1846 [*Argus* ed.], 804.) The Journal shows (pp. 1326, 1328) that the amendment proposed by Mr. Brundage was defeated by seventy-six votes against and five for it. At different times when the question was before the convention various amendments were offered that the term be limited to seven and to twenty-one years, but finally a term of twelve years was agreed upon. For an account of the proceedings on this subject see pages 681, 782, 802-805, 815 and 907 of the *Argus* edition of the Debates.

In the construction of constitutional and statutory provisions the mischief sought to be prevented should always be borne in mind, and the provision under consideration should be so construed as to prevent the mischief at which it was aimed. The mischief sought to be prevented was the creation of long terms by leases of agricul-

tural lands, reserving rent, which had been found by experience to be detrimental to the agricultural interests of all countries in which they had been permitted.

The evils arising from leases in fee and from leases for life were the subject of debates not only in the convention, but before it convened they had been discussed in executive messages, in the Legislature, and widely in the newspapers and pamphlets of the day. But in all the discussions the proposition was never advanced to abolish the right to lease agricultural lands for a long term of years and preserve the right to lease such lands in fee or for lives. The state of affairs existing at the time a statute is passed or a Constitution is adopted must be taken into consideration when interpreting either. This provision has been in force for more than fifty years, and no case has been found raising the question that leases for lives, reserving rent, of agricultural lands were not within the section. In *Van Rensselaer v. Dennison* (35 N. Y. 393) it is assumed that leases in fee are prohibited by the Constitution.

When the Constitution was adopted estates in land were (1 R. S. 722, § 1) as they now are (Chap. 547, Laws of 1896, § 20), divided into estates of inheritance, estates for life, estates for years and estates at will, and by sufferance. This lease, if valid, created a freehold estate in the grantee during his life (1 R. S. 722, § 6; chap. 547, Laws of 1896, § 24), out of which estate rent was reserved, which was precisely what the section of the Constitution was designed to prevent.

Under the common law and under our statutes estates for lives always have been, and now are, deemed superior to estates for years. It seems inconsistent to hold that the provision is limited in its application to leases for years of agricultural lands, and that it imposes no restriction upon leases for lives, out of which the evils arose which the provision was designed to prevent. I am of the opinion that leases for lives of agricultural lands, reserving rent, are prohibited by the Constitution, and that the lease under which the defendant claims is void.

It is urged that a person may waive a constitutional provision, or so conduct himself as to be estopped from asserting it. This is true when the provision simply relates to a private right, but it is not true when the provision is part of the public policy of the State

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In such a case the provision may be asserted, though it works a private wrong. A person cannot, by waiver or by acts which would usually raise an estoppel, validate a contract which is declared to be void by the fundamental law on grounds of public policy, nor can he estop his successor in interest from repudiating such a contract. In *Clark v. Barnes* (4 Wkly. Dig. 386, rev. 76 N. Y. 301) it was held that the party to such a lease, executed under circumstances which made it very inequitable to rescind, might repudiate it. Clark was the owner in fee of a farm which was leased in 1841 for three lives. Barnes was in possession under the lease. An action was brought by Clark to recover possession, and Clark and Barnes entered into a written contract settling the action and canceling the life lease, in consideration of the execution of leases of the same farm to Barnes, one for eight years, expiring February 1, 1873, and another for twelve years, beginning February 1, 1873. The two leases were executed. Barnes occupied the farm under the first lease until the end of the term and began to occupy under the second lease. Clark brought summary proceedings to recover possession upon the ground that the two leases were to be construed together and were void. It was held at General Term that the leases were good for twelve years and void only for the excess, but this judgment was reversed by the Court of Appeals, which held that a lease of agricultural lands for a longer period than twelve years, by which rent was reserved, was absolutely void. In the case cited the lessee had surrendered a lease for lives, in consideration of these leases for years; had occupied and improved the farm, but, nevertheless, it was held that the lease, being void under the Constitution, it could be repudiated by the lessor.

The judgment should be reversed and a new trial granted, with costs to abide the event.

ADAMS, J., concurred.

Judgment affirmed, with costs.

JOSEPH WEBER, Appellant, v. BUFFALO RAILWAY COMPANY,
Respondent.

Negligence — injury from driving into a pile of planking left unlighted at the approach to a canal bridge — liability of a railroad company for the act of an independent contractor laying its rails on the bridge.

In an action brought to recover damages for injuries sustained by the plaintiff, a member of the fire department of the city of Buffalo, while being driven to a fire, by reason of his coming in contact with a pile of planking left unlighted and unguarded in the approach to a public bridge over the Erie canal in that city, it appeared that the work in question was being done by an independent contractor with the Buffalo Railway Company, the defendant in the action, which operated a street surface railway in said city across the Erie canal upon the bridge, the property of the State of New York, which was under the supervision and control of the Superintendent of Public Works; by this superintendent the defendant had been granted a permit authorizing the reconstruction and strengthening of the bridge, upon the condition that the company "shall be held liable for and shall pay the damages that may occur or arise, either to the State or to individuals, in consequence of the reconstruction and strengthening of said canal bridge," and that the acceptance of the permit by the company "shall be deemed a covenant for the faithful performance of all the conditions and requirements herein contained," it being made the duty of the Superintendent of Public Works "to cause to be inserted in all contracts for work or repairs on the canals a clause requiring the contractor to pay all damages arising to the State or to any individual by reason of the negligence, default or misconduct of such contractor in the performance of such contract," and jurisdiction being (by chap. 321, Laws of 1870) "granted to and conferred upon the Canal Appraisers to hear and determine all claims against the State of any and all persons and corporations * * * resulting or arising from any accident or other matter or thing connected with the canals."

The independent contractor with the defendant agreed, among other things, to protect and save harmless the company from all damages "to persons or property of the public happening through the operations of the contractor."

Held, that, although the relation of master and servant did not exist between the company and the contractor, the true relation being that of principal and contractor, the defendant, having contracted with the State to perform the State's duty in its stead, and to pay all damages that might occur to the State or to individuals in consequence of the defendant's non-performance thereof, in view of the statutory obligation, was not absolved from its duty and responsibility in the premises to safeguard the public highway or approach to the bridge, by reason of its having employed an independent contractor to perform the work under a stipulation that he would perform such duty;

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That, as the very nature of the work which the defendant undertook to do involved danger to persons lawfully on the highway, it was the defendant's duty to see that proper safeguards or warnings were provided, while the work was in progress, to afford reasonable protection to the public.

APPEAL by the plaintiff, Joseph Weber, from a judgment of the Supreme Court in favor of the defendant, dismissing the plaintiff's complaint upon the merits, entered in the office of the clerk of the county of Erie on the 16th day of April, 1896, upon the verdict of a jury rendered on a trial at a Trial Term in Erie county by direction of the court.

C. S. Crosser, for the appellant.

Porter Norton, for the respondent.

GREEN, J. :

This action was brought to recover damages for injuries alleged to have been sustained by the plaintiff on the 12th day of October, 1891, by reason of the defendant's negligence. The negligence imputed to the defendant is, that a pile of planking and other materials were left unlighted and unguarded in the approach to a public bridge over the Erie canal in Main street, in the city of Buffalo, against which the plaintiff, while going to a fire as a member of the fire department of the city, was driven. This unguarded pile was left in the condition it was on the night of the accident by a contractor, to whom the defendant had let the contract of laying its tracks across the bridge.

The defense on the trial was, that the negligence complained of was the act of an independent contractor, over whom the defendant had no control.

The defendant operated a street surface railroad in the city of Buffalo, and this railroad crossed the Erie canal upon a bridge, which was the property of the State, and under the supervision and control of the Superintendent of Public Works and other State officials. Prior to the year 1891 horse power was used for the purpose of propelling defendant's cars; but, upon the adoption of electricity as a motive power, it became necessary that the bridge should be reconstructed, so as to admit of the passage of heavy motor cars; and the defendant contracted with the Kellogg Iron Works for the perform-

ance of the work. The contractor agreed, among other things, to protect and save harmless the company from all damages "to persons or property of the public, happening through the operations of the contractor." It appears from the evidence that a part of the planking of the bridge had been removed and piled in the street at right angles across the car tracks, at a point from two to eight feet back from the bridge. This pile of planks was three or four feet high. The street, as it crossed the bridge, consisted of several foot and driveways; and, at the time of the accident, the central and next easterly passages were torn up in the manner described. The bridge was in this condition on the night or early morning of the date aforesaid, when the plaintiff and others, being on their way to a fire, in answer to a call, and riding in a hose cart southerly on Main street, collided with this obstructing pile of planks, whereby the plaintiff was thrown violently out and injured. Prior to the performance of any work upon the bridge, the defendant applied for and procured a permit from the Superintendent of Public Works, consenting to the reconstruction and strengthening of the bridge. The permit was granted upon the condition that the company "shall be held liable for, *and shall pay*, the damages that may occur or arise, either to the State *or to individuals*, in consequence of the reconstruction and strengthening of said canal bridge;" and that an acceptance of the permit by the company "shall be deemed a *covenant* for the faithful performance of all the conditions and requirements herein contained." It was also provided that all work should be under the supervision of the superintendent or an inspector to be appointed by him, upon plans and specifications approved, and the salary of the inspector to be paid by the company.

It is provided that no bridge shall be constructed across any canal without first obtaining, for the model and location thereof, the consent in writing of the Superintendent of Public Works. (1 R. S. [8th ed.] 772, § 175.) And it is made the duty of such superintendent "to cause to be inserted in all contracts for work or repairs on the canals, a clause requiring the contractor to pay all damages arising to the state, or to any individual, by reason of the negligence, default or misconduct of such contractor in the performance of such contract." (Laws 1866, chap. 836, § 9; 1 R. S. [8th ed.] 742, 743.)

In the present case the relation of master and servant did not exist between the company and the contractor, but the true relation was that of principal and contractor. It is true that the company had the right of superintending and supervising, by its agents, the execution of the work, and giving directions in relation thereto; but the decisions show that these circumstances do not of themselves render a principal liable for the negligent act of the contractor, unless it was brought about by the order of the principal.

But the important question still remains whether the plaintiff has not shown that the company owed such a duty towards him that it could not, by delegating that duty to a contractor, escape liability thereunder should the contractor be guilty of negligence in the performance of the work which he had contracted to execute.

A preliminary inquiry concerns the statutory duties and liabilities assumed by the State itself in respect of the canals, as well as those imposed by statute upon contractors with the State.

By chapter 321, Laws of 1870, jurisdiction was conferred upon the Canal Appraisers, now Court of Claims, "to hear and determine all claims against the State of any and all persons and corporations, for damages alleged to have been sustained by them from the canals of the State, or from their use and management, or resulting or arising from the negligence or conduct of any officer of the State having charge thereof, or resulting or arising from any accident or other matter or thing connected with the canals; but no award shall be made unless the facts proved shall make out a case which would create a legal liability against the State were the same established in evidence in a court of justice against an individual or corporation." (1 R. S. [8th ed.] 736.)

If the State itself had undertaken, through its officials, the reconstruction or alteration of this bridge, it is clear that a duty would be imposed upon the State to erect or place proper and sufficient safeguards for the protection of the traveling public, and for the non-observance or non-discharge of such duty, or through misfeasance in its discharge, an action would lie, at suit of the party injured, against the State. (*Sipple v. State*, 99 N. Y. 284; *Rexford v. State*, 105 id. 229; *Bowen v. State*, 108 id. 166; *Wordman v. State*, 127 id. 397; *Locke v. State*, 140 id. 481.)

In *Little v. Banks* (85 N. Y. 258, 263) this broad proposition

was laid down: "Contractors with the State, who assume, for a consideration received from the sovereign power, by covenant, expressed or implied, to do certain things, are liable, in case of neglect to perform such covenant, to a private action at the suit of the party injured by such neglect, and such contract inures to the benefit of the individual who is interested in its performance. (*Weet v. Village of Brockport*, 16 N. Y. 161; *Robinson v. Chamberlain*, 34 id. 389; *Fulton Fire Ins. Co. v. Baldwin*, 37 id. 648; *Johnson v. Belden*, 47 id. 130; *City of Brooklyn v. Brooklyn City R. R. Co.*, 47 id. 476; *McMahon v. Second Avenue R. R. Co.*, 75 id. 231; *Conroy v. Gale*, 5 Lans. 344; 47 N. Y. 665.) The ground upon which these decisions are founded is a broad principle of public policy essential to the public welfare." (And see, also, *Wainwright v. Queens County Water Co.*, 78 Hun, 146, 150; *Cook v. Dean*, 11 App. Div. 125; *Glens Falls Gas Light Co. v. Van Franken*, Id. 420, 429.)

In *French v. Donaldson* (57 N. Y. 496; 5 Lans. 293) the court observed: "Whatever doubts, if any, have existed since the case of *Adsit v. Brady* (4 Hill, 630, followed and affirmed in *Robinson v. Chamberlain*, 34 N. Y. 389, and other cases), in relation to the duty of a contractor for canal repairs or of his liability to an individual who has sustained damages by reason of a defect in a bridge over a portion of the canal he had, prior to the legislation of 1866 and 1867, contracted to repair or keep in repair, is disposed of by the legislation of those years." (1 R. S. [8th ed.] 742, 743.)

In *McMahon v. Second Avenue Co.* (75 N. Y. 231) this doctrine was laid down: "A liability may arise in two ways: *First*, from the defendant's having contracted with the municipality to do, instead of it, the duty which was upon it, to keep the street safe for the passage of the public; and by neglect to do that duty, having given cause of action against the municipality for neglect; then action will be directly against the defendant therefor, instead of first against the municipality, so as to avoid circuitry of action (*City of Brooklyn v. Brooklyn City R. R. Co.*, 47 N. Y. 475); and, *second*, from the defendant's voluntarily interfering and undertaking to make the way safe, and so inefficiently doing it as to leave it unsafe, and, at the same time, so as to permit and tempt passage over it."

The defendant having contracted with the State to perform this

duty in its stead, and to pay all damages that may occur or arise to individuals in consequence of its non-performance or inadequate performance, the question for determination is, whether the company may relieve itself from the obligations imposed by the contract and absolve itself from all responsibility to the traveling public by entering into a contract with another to perform such duty. In other words, may it avoid the duty in question and the consequent liability to persons who suffer injury from its neglect, by bringing another contractor into a stipulation that he will perform such duty? It should be observed that the duty is not only assumed by the contract with the State, but it is also imposed by the statute, and not only did the superintendent possess the legal power to insert this contractual provision in the permit granted (*Little v. Banks*, 85 N. Y. 258), but it was also his duty to do so. True it is that the defendant entered into no *contract* with the State for the reconstruction of the bridge, but having received permission to alter and reconstruct a public work, to subserve its own private purposes it assumed the same duty to the State and the same responsibility to individuals imposed by the statute upon contractors with the State, at least in respect to the safety of the public streets. The defendant, therefore, undertook to perform a statutory duty in respect to the public highway.

The State would be bound to place proper safeguards for the protection of the traveling public, and the company undertook to do the same by its covenant.

If this construction be correct, then the defendant was liable for damages occurring from its neglect or failure to perform this duty as it would be for any other neglect of duty. The company stands exactly in the position of the State, and is equally liable for its negligence in this regard. When it assumed the duties imposed by the permit, it made itself liable for all injuries resulting from its non-performance or insufficient performance. The company could not relieve itself from the obligation imposed by its covenant with the State, by contracting with another to fulfill it. It was an imperative duty required by the permit, and the company was not absolved from its duty and responsibility because it employed a contractor to do the work, who assumed to protect and save harmless the com-

pany. A failure to safeguard an excavation or opening in a public highway or bridge by those who have assumed that duty from the State, makes the party who has assumed the obligation liable to an action at the suit of any one who has sustained a special damage.

The company was not bound, in point of law, to do the work itself, that is, by servants of its own. There is nothing to prevent it from employing a contractor to do the work for it; but the company cannot, by employing a contractor, get rid of its own duty to other people whatever that duty may be.

If the contractor performs the company's duty for it, it is performed by the company through him, and it is not responsible for anything more. It is not responsible for his negligence in other respects, as it would be if he were the company's servant. Such negligence is sometimes called causal or collateral negligence. If, on the other hand, the contractor fails to do what it is the company's duty to do, or get done, its duty is not performed, and it is responsible accordingly.

In *Dalton v. Angus* (6 App. Cas. 740, 829) Lord BLACKBURN thus laid down the law: "Ever since *Quarman v. Burnett* it has been considered settled law that one employing another is not liable for his collateral negligence, unless the relation of master and servant existed between them; so that a person employing a contractor to do the work is not liable for the negligence of that contractor or his servants. On the other hand, a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor. He may bargain with the contractor that he shall perform the duty, and stipulate for an indemnity from him if it is not performed, but he cannot thereby relieve himself from liability to those injured by the failure to perform it." Lord BLACKBURN, in this passage, contrasts a contractor's negligence, which he calls "collateral," with failure on the part of a contractor to perform the duty of his employer. For the first, the employer is not liable, for the second he is, whether the failure is attributable to negligence or not. (See, also, *Hughes v. Percival*, 8 App. Cas. 446.)

It is not easy to avoid mistakes in applying this, or, indeed, any other principle to difficult cases. Neither is it easy to express the

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principle in terms which will apply to all cases. Still, as the very nature of the work which the company here undertook to do involved danger to persons lawfully on the highway, who might approach the bridge in the night time and attempt to cross it, it was bound to see that proper safeguards or warnings were provided while the work was going on, so as to afford reasonable protection to the public. It has been repeatedly held that a municipal corporation is not relieved from its obligation in this respect because it has employed a contractor to do the work, and the contractor stipulates to adopt all necessary precautions for the prevention of accidents during its progress, and to save the city harmless from all claims for injuries which may be incurred. (*Storrs v. The City of Utica*, 17 N. Y. 104; *McCafferty v. S. D. & P. M. R. R. Co.*, 61 id. 178, 183, 202; *King v. N. Y. Central & H. R. R. R. Co.*, 66 id. 181, 185; *Brusso v. City of Buffalo*, 90 id. 679; *Turner v. City of Newburgh*, 109 id. 301, 305, 306; *Dressell v. City of Kingston*, 32 Hun, 526; *Pettengill v. City of Yonkers*, 116 N. Y. 558; *Scanlon v. City of Watertown*, 14 App. Div. 1.)

The *ratio decidendi* of these and other analogous cases is, that as the duty was imposed upon the defendant by law, he or it could not escape liability by delegating the performance of the duty to a contractor, for the obligation was imposed upon the defendant to take the necessary precautions to insure that the duty should be performed, and it was incumbent upon the defendant to see that these operations were safely carried out by the contractor.

In *Engel v. Eureka Club* (137 N. Y. 100-104) ANDREWS, Ch. J., states that there are well-understood exceptions to the maxim *qui facit per alium, facit per se*. "Cases of statutory duty imposed upon individuals or corporations; of contracts which are unlawful, or which provide for the doing of acts which when performed will create a nuisance, are exceptions. In cases of the first-mentioned class the power and duty imposed cannot be delegated so as to exempt the person who accepts the duty imposed from responsibility; and in cases of the second class exemption from liability would be manifestly contrary to public policy, since it would shield the one who directed the commission of the wrong." (Citing *Storrs* case and others.)

If the person for whom the work is done is under a pre-existing

duty or obligation to have the work done in a particular manner, he cannot be discharged from that duty by creating between himself and another the relation of employer and contractor, and so cast upon the latter the burden of his own responsibility. He is himself bound to see that the duty is discharged. (Dwight, Com., in 61 N. Y. 186.)

In *Flynn v. New York Elevated R. Co.* (49 N. Y. Super. Ct. 60, 67) it was held that "the nature of the work itself done for the elevated railroad company in making these excavations in the public streets was dangerous, and the company could not escape responsibility for putting the street in a condition dangerous to travel at night by interposing any contract which they had made for doing the very thing which caused the damage." (Citing the *Storrs* case.)

Upon the same principle, we apprehend, must the decision of the present case be founded. A duty was imposed by law upon the defendant towards the plaintiff, as one of the public, not to interfere with the right which the plaintiff possessed of using a public highway in such a manner as to impede or injure him when passing along it. The defendant is liable for the breach of the duty thus imposed upon him, although the act or default which caused the injury may have been the act or default of the defendant's contractor and not of defendant itself.

The negligent act or omission, if established, constituted an unlawful invasion of the plaintiff's right of transit over the public highway. It appears clear enough to us that, under the circumstances of this case, a duty was imposed upon the defendant which it could not evade by employing a contractor to do the work. It could not get rid of the responsibility thus cast upon it by transferring that duty to another. It was not competent to get rid of such a duty by imposing it upon an independent contractor. A duty rested upon the company; therefore, to insure such precaution in doing the work as to render the highway reasonably safe against the possibility of accidents to the traveling public.

This duty, it is assumed, was not performed. It employed a contractor to perform the duty for it, but the contractor failed to perform it. It is impossible, we think, to regard this as a case of "collateral" negligence.

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An important fact to be observed is, that the defendant corporation is vested with an extensive franchise or privilege in respect of the use of public streets and bridges, and may be said to be, in a sense, in continuous possession and control of them. It is bound to keep in repair a portion of the streets, and has other duties to perform towards the public in respect of their use as a street railroad.

In consideration of a license directly from the State to do what, otherwise, would be unlawful and a public nuisance, it undertook to perform the duties imposed by the State upon itself, and to indemnify it against all liability for damages sustained by any individual.

In view of the provisions of chapter 836 of the Laws of 1866, and the authorities heretofore referred to, it must be held that the duty in question was one that the company could not relieve itself from liability for its own non-performance by interposing an independent contractor between itself and the general public.

We conclude, therefore, that the learned trial justice erred in directing a verdict in favor of the defendant, and that the judgment entered in accordance with such direction must be reversed.

Judgment reversed and a new trial ordered, with costs to abide the event.

All concurred.

Judgment reversed and a new trial ordered, with costs to abide the event.

CHARLES H. CLARK and MORRIS F. CLARK, Respondents, v. LEOPOLD MALZACHER, Appellant.

Costs — on appeal from the Municipal Court of Rochester.

In an action brought in the Municipal Court of Rochester to recover thirty-seven dollars and fifty cents for merchandise sold, in which the defendant answered, interposing a counterclaim and demanding judgment in his favor for five hundred dollars, judgment was rendered in favor of plaintiffs for thirty-five dollars and twenty-five cents damages and ten dollars and sixty-five cents costs, from which the defendant appealed to the County Court of Monroe County demanding a new trial, on which a verdict was rendered in favor of the defendant for "no cause of action."

Held, that although the defendant did not sustain his counterclaim, the verdict was in his favor to the extent of destroying the judgment and claim of the

plaintiffs, which stood against him when the appeal was taken, and that, no offer of judgment having been made by either party, he was entitled to costs upon such appeal.

APPEAL by the defendant, Leopold Malzacher, from an order of the County Court of Monroe county, entered in the office of the clerk of the county of Monroe on the 29th day of March, 1897, disallowing and canceling of record defendant's costs and disbursements herein as taxed by the clerk of Monroe county.

Frederick A. Mann, for the appellant.

William W. Armstrong, for the respondents.

GREEN, J. :

This action was brought in the Municipal Court of Rochester to recover thirty-seven dollars and fifty cents, alleged in the complaint to be due and owing from the defendant to plaintiffs for fifty soap cutters, manufactured and sold to defendant, at his request, and upon his agreement to pay therefor the above-mentioned sum. The defendant answered and interposed a counterclaim for defective construction and breach of guaranty in the manufacture of the cutters, and demanded judgment in his favor for \$500. The issues thus joined were tried before a judge of the Municipal Court of Rochester, and resulted in a judgment in favor of the plaintiff for thirty-five dollars and twenty-five cents damages and ten dollars and sixty-five cents costs. From that judgment the defendant appealed to the County Court of Monroe county and demanded a new trial therein. Upon such appeal no offer of judgment was made by either party. A new trial was thereafter had before the county judge of Monroe county and a jury, and resulted in a verdict in favor of the defendant of "no cause of action." Judgment was thereupon entered in accordance with such verdict, together with costs to the defendant, as taxed by the county clerk of Monroe county. From such taxation the plaintiff appealed to the County Court of Monroe county, and that court set aside the costs as taxed and disallowed any costs to the defendant, and directed the clerk to cancel the same of record.

The practice in this case is prescribed by section 3070 of the Code of Civil Procedure, and the provision in that section applicable to

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the question here involved is this : " If neither party makes an offer, as provided herein, the party in *whose favor* the verdict, report or decision in the appellate court is given, shall be entitled to recover his costs upon the appeal." This is plain language, plainly expressing the intent of the Legislature to give costs to the party who recovers in the appellate court whether the amount of such recovery be great or small, or whether such party recovers all the claim which he makes in his pleading.

In the case at bar the judgment of the Municipal Court of Rochester established the claim of the plaintiff and disallowed the claim made by the defendant. At the time of the appeal therefrom by the latter, a judgment had been entered and stood against him, establishing plaintiff's claim and disallowing the claim of the defendant. From that judgment the defendant appealed, and the decision of the appellate court established the fact that the plaintiff had no claim against the defendant and that the defendant had no claim against the plaintiffs. The verdict was, therefore, in favor of the defendant, to the extent of destroying the judgment and the claim of plaintiffs which stood against him when the appeal was taken. The verdict, it is true, was not so favorable to the defendant as he claimed it should have been ; and yet it was in his favor, as it relieved him from plaintiffs' judgment and claim and the judgment established by the Municipal Court of Rochester. His right to costs, therefore, is not made dependent upon the amount, but on the fact of recovery and, if no offer has been made, it depends upon nothing else. (*Pierano v. Merritt*, 148 N. Y. 293.)

The verdict in this case being in favor of the defendant, brings this case within the plain provisions above quoted, and justified the taxation of costs herein in favor of the defendant, and requires the reversal of the order of the County Court of Monroe county, and the affirmance of the act of the county clerk.

The order of the County Court of Monroe county is reversed, and the taxation of costs by the county clerk of Monroe county is affirmed, with costs.

All concurred, except FOLLET, J., not sitting.

Order of County Court of Monroe county reversed, with ten dollars costs and disbursements, and taxation of the clerk affirmed.

WILLIAM H. SHAFFER, as Receiver of the Partnership Property of RICHARD CURRAN and FRANCES T. GOLER, Constituting the Firm of CURRAN & GOLER, Respondent, v. SABINA C. MARTIN and Others, Appellants, Impleaded with RICHARD CURRAN and Others.

Decision — stating concisely the grounds on which the issues have been decided — it must state how the issues were decided.

The amendment in 1894 of section 1023 of the Code of Civil Procedure, permitting the court or referee before whom issues have been tried, to file a decision stating concisely the grounds upon which the issues have been decided, instead of one stating separately the facts found and the conclusions of law, did not relieve the court or referee, assuming to take advantage of the amendment, from the necessity of stating how the issues were decided.

Consequently, where there were several issues of fact and of law involved, in an action brought by a receiver for the benefit of creditors of a copartnership to obtain a fund representing property described in a bill of sale and chattel mortgage executed by the members of the copartnership, and which the receiver alleged to have been fraudulent and void as to creditors, it was

Held, that a decision which merely stated that the plaintiff was entitled to the fund, "that said bill of sale and said alleged chattel mortgage be set aside as void and in fraud of creditors," and that the plaintiff was entitled to costs of the action, was insufficient to support a judgment.

APPEAL by the defendants, Sabina C. Martin and others, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Monroe on the 17th day of August, 1896, upon the decision of the court rendered after a trial at the Monroe Special Term setting aside as fraudulent a bill of sale executed by Richard Curran in the name of Curran & Goler, December 9, 1895, and a chattel mortgage executed by Frances T. Goler in the name of Curran & Goler, December 10, 1895.

James Breck Perkins, for the appellant Martin.

F. E. Drake, for the appellants King.

P. M. French, for the respondent.

FOLLETT, J. :

This equitable action was begun January 21, 1896, to set aside as fraudulent and void as to the creditors of the firm of Curran & Goler a bill of sale executed December 9, 1895, by Richard Curran, in the name of the firm, to Sabina C. Martin, George H. King and Rosa R. King, and a chattel mortgage executed December 10,

1895, by Frances T. Goler, in the name of the firm, to Frank H. Goler, as trustee for eight creditors of said firm.

In an action brought for the dissolution of the firm of Curran & Goler because of its insolvency, the plaintiff was, December 17, 1895, appointed receiver thereof, and, by agreement among the litigants, approved by the court, the property affected by the bill of sale and chattel mortgage was sold by the plaintiff, and the fund arising therefrom deposited, and this litigation is over the fund so on deposit.

Sabina C. Martin, George H. King, Rosa R. King and Frank H. Goler severally answered, but Richard Curran and Frances T. Goler did not answer. There are three classes of defendants in this action: Sabina C. Martin, represented by Perkins & Hays, her attorneys; George H. King and Rosa R. King, represented by Drake & Milliman, their attorneys, and Frank H. Goler, represented by Raines & Van Auken, his attorneys.

Several issues of fact and of law were involved in the decision of this action. The court filed the following decision:

"Judgment for plaintiff that he is entitled to the funds realized from the sale of the property and effects of said firm of Curran & Goler, and that said bill of sale and said alleged chattel mortgage be set aside as void and in fraud of creditors. Plaintiff is entitled to the cost of the action. WM. E. WERNER,

"Dated August 14th, 1896.

J. S. C."

This decision does not specify whether the costs are payable out of the fund or by all the defendants contesting and non-contesting. Nevertheless, the judgment entered awards costs against the defendants personally who did not answer as well as against those who did answer.

By chapter 688 of the Laws of 1894, which took effect June 1, 1894, section 1023 of the Code of Civil Procedure, which authorized litigants to prefer requests to find, was repealed, and section 1022 amended so as to permit courts and referees, instead of stating separately the facts found and the conclusions of law, to "file a decision stating concisely the grounds upon which such issues have been decided." The repeal of section 1023 and the amendment of section 1022 was to remedy the practice, which had grown into an abuse, by the attorneys of litigants asking courts and referees to pass

on evidentiary facts, on facts simply relevant to the issue, instead of on the facts in issue—the facts upon the existence of which the right or liability of the litigants in the action depends. It was not intended to relieve trial courts from deciding the issues of fact and law—those upon the existence of which the right or liability of the litigants depends—and from disclosing how those issues were decided. The facts found, and the conclusions of law, need not be separately stated, but the issues of fact and law, as above defined, must be decided, and the decision must disclose how they are decided, otherwise it is impossible to state concisely the grounds on which the issues were decided.

Section 1022, as amended, commands the Appellate Division, in case the decision concisely states the grounds upon which the issues have been decided, to review all questions of fact and law, and authorizes that tribunal to modify or affirm the judgment or order appealed from, award a new trial, or grant to either party the judgment which the facts warrant. But this provision was not intended to relieve trial courts and referees from determining the essential issues, and from disclosing, by their decisions, how the issues were determined, and thus cast the burden on the Appellate Divisions of so deciding and stating the issues of fact and law that the judgment can be reviewed by the Court of Appeals. The Appellate Division cannot see the witnesses face to face and hear them testify, and ordinarily is not as well qualified to determine and state the facts as the trial courts. One of the grievances sought to be remedied by the Constitution of 1846 was the taking of testimony in equity cases before masters, and leaving the issues to be decided by tribunals which had never seen or heard the witnesses. Section 10 of article 6 provided: "The testimony in equity cases shall be taken in like manner as in cases at law," which provision is contained in section 3 of article 6 of the present Constitution. It is of little use to decide issues of fact or of law unless it be disclosed how they are decided. If the practice adopted in this case is to prevail, the evil of allowing tribunals, who have not heard the witnesses, to decide and state the issues of fact, will be restored, not only in equitable actions but in legal ones as well.

In *Amherst College v. Ritch* (151 N. Y. 282) the Court of Appeals said: "We think that the effect of a decision by the trial court,

without expressing the facts found, is the same as if there had been a general verdict rendered by a jury, and that the same presumptions arise in its support." (P. 320.)

This being so, the question is naturally suggested, how could an appellate court intelligently review the general verdict of a jury unless the issues of fact, upon which the jury passed, were stated by the justice presiding at the trial, and it is no more feasible to review a case decided by a decision in the form of the one in the case at bar than it would be to review a judgment entered on the general verdict of a jury, without any directions on the part of the justice presiding at the trial. All the evils arising from such a practice cannot now be foreseen, but among them is the impossibility of determining what issues have been decided in favor of one party and against the other, in case the judgment is ever pleaded in bar in a subsequent action involving some of the supposed issues. Judgments involving the title to land arising in contests under conveyances and wills entered on such decisions would ultimately lead to great confusion. If it be said that the pleadings can be resorted to for the purpose of ascertaining the issues, the answer is that, under our modern system of pleadings and the practice which prevails, they frequently do not state all the essential issues tried and determined and embrace many that were not determined. The result is that the decision filed in this case is insufficient to support the judgment, which must be vacated, and the case remanded to the Special Term for a decision by the justice who tried it, in accordance with the rule herein laid down. Such was the practice in *Putzel v. Schulhoff* (25 J. & S. 505); *Clason v. Baldwin* (36 N. Y. St. Repr. 982); *Reynolds v. Aetna Life Ins. Co.* (6 App. Div. 254); *Hall v. Beston* (13 id. 116), and *McManus v. Palmer* (Id. 443).

Neither party having moved to set aside the judgment because of the insufficiency of the decision, it is vacated, without costs to either party, and remanded to the Special Term for a decision in accordance with section 1022 of the Code of Civil Procedure.

All concurred.

Judgment reversed and the case remitted to the Special Term for findings and decision in accordance with section 1022, Code Civil Procedure, without costs of this appeal to either party.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. JOHN F.
DORTHY, Appellant.

Larceny — an indictment charging the offense in the terms of the statute, is sufficient — a judgment roll is evidence for what parties an attorney appeared as bearing on his claim for compensation from others — his own acts, but not the decision of others, may be shown on the cross-examination of the prisoner to discredit him.

An indictment for larceny under subdivision 2 of section 528 of the Penal Code, is sufficient if it alleges that the defendant, while having in his possession as "servant, agent, attorney and bailee" (such being the terms used in the statute itself) the money in question, appropriated the same to his own use, and it is not necessary that the indictment should set forth the facts showing the agreement by which such relations were created.

Upon the trial under such an indictment, the defendant claimed to have acted in an action in conjunction with one Rich as counsel for certain parties represented by Rich. The claim of the prosecution was that the money which the defendant appropriated to his own use was given to him by Rich for the purpose of defraying referee's fees and other expenses in that action, while the claim of the defendant was that he had the right to and did apply the moneys upon an indebtedness due him from the clients of Rich for professional services.

Held, that the judgment roll in the action in question, from which it appeared that the defendant appeared for certain executors who were parties to the action, was competent evidence on the part of the People to show that the defendant's claim that he in any manner represented Rich's clients was without foundation for the reason that, as he was acting as attorney for the executors, he could not also represent the other parties to the action, and that, therefore, his claim to be entitled to the moneys as compensation for his services could not be maintained.

Upon the trial under an indictment for larceny it is not permissible for the People upon the cross-examination of the defendant, who has been sworn as a witness in his own behalf, to prove by him that he had been expelled from the Baptist church, or that in proceedings to disbar him from practicing as an attorney and counselor at law, a referee and an Appellate Division of the Supreme Court had found him guilty of several specific acts of larceny, not connected with the one for which he was on trial, and also of suppressing evidence which should have been presented to a grand jury.

While such a witness may, upon his cross-examination, be compelled to testify as to collateral acts of his own tending to prove his moral degradation, he cannot be compelled, with a view to proving such moral degradation, or to impeach him as a witness, to testify to the conclusions of others, except it be the conviction for a crime, or such confinement in prisons or jails as would indicate a conviction.

ADAMS, J., dissented.

APPEAL by the defendant, John F. Dorthy, from a judgment of the Supreme Court in favor of the plaintiff, rendered at the Monroe Trial Term on the 7th day of November, 1896, convicting him of the crime of grand larceny in the second degree, and from an order denying his motion for a new trial made upon the minutes; also from an order of the Supreme Court, made at the Monroe Special Term and entered in the office of the clerk of the county of Monroe, on the 6th day of April, 1897, disallowing the defendant's demurrer to the indictment; also from an order of the Supreme Court, made at the Monroe Special Term and entered in the office of the clerk of the county of Monroe on the 8th day of June, 1897, denying the defendant's motion for a new trial made upon the ground of newly-discovered evidence.

At the conclusion of the People's case the defendant's counsel moved to dismiss the indictment and each and every count therein upon the ground that the evidence was insufficient to warrant a conviction, and upon the trial the defendant objected to the second count of the indictment, specifically because it did not allege sufficient facts under subdivision 2 of section 528 of the Penal Code to create the offense of larceny.

The indictment contained three counts. *First*, accusing the defendant of larceny in unlawfully and feloniously taking, stealing and carrying away money from one William G. Rich, the owner thereof, with intent to defraud him and to appropriate the same, etc. The second count, that the defendant "was employed in the capacity of servant, agent, attorney and bailee of one William G. Rich, and as such servant, agent, attorney and bailee then and there had in his possession, custody and control \$250 in money * * * of the value of \$250 of the money, property, evidence of debt and credit, things in action and possession of the said William G. Rich for and on account of the said William G. Rich; and the said John F. Dorthy, on the day and in the year last aforesaid, at the city of Rochester, in this county (Monroe), fraudulently and feloniously did take, make way with, embezzle and appropriate to his own use, without the assent of the said William G. Rich, said money, * * * with the intent then and there to deprive and defraud the said William G. Rich of his said money and property and of the use and benefit thereof." The third count charged the defendant with

feloniously secreting, withholding and appropriating to his own use the said money, with intent then and there to deprive and defraud the said Rich of the same. These several offenses were charged in the indictment as larceny in the second degree. The defendant was convicted of larceny in the second degree and was sentenced to Auburn State prison for the term of three years and two months.

The defendant was an attorney and counselor at law, transacting business at Rochester, N. Y. The complainant, William G. Rich, was an attorney at law residing at Woonsocket, Rhode Island, and was attorney in fact for quite a number of persons who were heirs at law of Jonathan C. Taylor, formerly of Rochester, deceased. Taylor died in February, 1891, leaving a will bestowing his property, valued at \$20,000 and upwards, upon his wife during her life, with the remainder, after her death, \$1,000, to the First Congregational Church of Northbridge, Massachusetts, and the balance to the American College and Educational Society at Boston, Massachusetts; his will was duly admitted to probate, and Herman K. Phinney and Henry C. Heath were appointed and qualified as executors of the will.

It was claimed by the heirs of Taylor that the will disposed of more than one-half his property to the corporations named, and was, therefore, void in respect to more than the half, and an action was commenced by John C. Rich and others, plaintiffs, against William B. Tiffany and others (the parties being the heirs at law of Taylor), and the relief demanded in the complaint was that it should be adjudged that the said Taylor died intestate as to one-half of his estate, and for a partition and division of the premises according to the respective rights of the parties. The action was known in the case as "Rich against Tiffany." William G. Rich represented the plaintiffs, and to some extent other heirs in the matter, and before the action was commenced entered into negotiations with the defendant Dorthy to represent his clients as the New York attorney in the action. At that time Mr. Dorthy was the attorney for the executors of Taylor, who objected to his becoming the plaintiffs' attorney in the action, but Dorthy advised them that the only interest the executors had in the matter was to see that the property was distributed as the law required, and there was no real conflict in interest between the executors and the heirs of the estate. The

complaint in the action was signed, however, by another attorney. Several firms of lawyers appeared for different defendants, and Dorthy appeared for the executors; the defendants' answering putting at issue the complaint to some extent—Dorthy acting also, in conjunction with Rich, to a considerable extent as the counsel for the parties represented by William G. Rich, having interviews with him, correspondence and other transactions in the interest of the heirs at law.

This action was referred to a referee to hear, try and determine, and the referee's, stenographer's fees and other expenses of the trial amounted to about \$250, the referee's fees being \$100. After the trial of the case and the decision of the referee, his report was withheld for fees. The defendant drew upon William G. Rich through a bank in Rochester for \$250 and so notified him by telegraph. The draft was honored and the defendant received the money, and it was claimed by Rich that that money was sent to Dorthy to pay the fees and other expenses and not for his personal use, while Dorthy contended that he had the right to and did apply the money upon an indebtedness due him from the clients of Rich for his professional services in the action. This difference presented the two theories upon which the trial for larceny was conducted, and the jury found with the People. Much evidence was given in the case, and the disputed point was litigated at great length as to whether Dorthy received this money as the agent and attorney of Rich for the special purpose named or whether he received it as a payment upon an indebtedness due him from Rich and his clients. Important rulings at the trial and other facts appear in the opinion of the court.

John Van Voorhis, for the appellant.

George D. Forsyth, for the respondent.

WARD, J.:

The learned counsel for the appellant presses upon our consideration upon this appeal numerous exceptions taken upon the trial and in the proceedings in the action. We have examined them with the care which the importance of the subject demands, and do not

deem it important to direct our attention upon this review to any of the points made by the counsel except the following:

First. The admission of the judgment roll in the action of *Rich v. Tiffany* in evidence.

Second. As to the sufficiency of the second count in the indictment.

Third. As to the admission of the evidence concerning the defendant's membership of a Baptist church and the admission of proof of the proceedings in the Supreme Court to disbar and the disbarment of the defendant as an attorney at law.

Fourth. The denial of the motion for a new trial upon the ground of newly-discovered evidence.

Upon the trial the People offered in evidence the judgment roll in *Rich v. Tiffany*. It was a history of the proceedings of the trial and of the judgment, and it was important to establish a disputed fact as to the date of the referee's report and to show the relations of the defendant to the case, the People claiming that this record was evidence that the claim of the defendant that he in any manner represented the heirs at law of Taylor in that action was without foundation, and that, as he was acting as attorney for the executors, he could not also represent the other parties to the action, and that, therefore, his claim for compensation as against Rich and his clients could not be maintained. We think this judgment roll was competent for the purposes claimed by the People and for other purposes, and we find no reversible error in its admission as evidence.

Nor was there error in the ruling by the trial court as to the sufficiency of the second count in the indictment. This count charged as a fact that in the transaction concerning the \$250 received by the defendant from Rich that Dorthy was the servant, agent, attorney and bailee of Rich and occupied a fiduciary relation to him. It is contended by the learned counsel for the defendant that this was not a sufficient allegation to establish such an agency or relation, but that the indictment should have set forth the facts showing the agreement which constituted the defendant an agent, bailee or attorney, and that the allegations in the indictment are mere conclusions of law; but it is usually sufficient, and we hold it in this case to be sufficient, if the indictment avers the offense as the statute defines it to be. (*Phelps v. The People*, 72 N. Y. 349;

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People v. Weldon, 111 id. 569, 574; *Eckhardt v. The People*, 83 id. 462; *People v. West*, 106 id. 293.)

FOLGER, J., said in *Phelps v. The People* (*supra*): "If the indictment avers the offense as the statute defines it, the averment is sufficient. For the rule is that while, in framing an indictment on a statute, all the circumstances which constitute the definition of the offense in the statute itself, so as to bring the accused precisely within it, must be stated, yet no other description of the thing in which the offense was committed is necessary to be stated than that contained in the statute itself."

The term "servant, agent, attorney and bailee," used in this indictment, in describing the defendant in his relation to this money charged to have been stolen, are terms well understood both at law and in common parlance, and the defendant could not in any manner have been prejudiced or misled by the use of any of these terms, and they are the same terms used in the statute itself.

But more serious questions confront us.

Upon the trial the defendant was sworn as a witness in his own behalf, and, after testifying to matters in issue, he was cross-examined by the district attorney, and we quote from the record: "Q. You were a member of the Baptist church once, weren't you? [Mr. Van Voorhis objected as incompetent and immaterial. Received and exception.] A. I was. Q. Are you a member now? [Mr. Van Voorhis objected as incompetent and immaterial. Received and exception.] A. No, sir. Q. Did you state in a communication to the Baptist church authorities of the city of Rochester, or any of them, that while they had withdrawn from you the hand of Christian fellowship, that you should still continue to work in the cause of Christ? [Mr. Van Voorhis objected as incompetent and immaterial, and because that any statement he made in a letter can only be proved by the letter. Received and exception.] A. My answer is that all the communications that I had with the Second Baptist Church are in writing, and I desire to produce them if you are going into the subject. I said in one communication that, notwithstanding their action, I should still continue to be interested in the cause. I am not here to say whether I am a moral gentleman or not. I so regard myself."

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This matter was strictly collateral to the issues being tried and was not authorized by any portion of the direct examination of the witness. The effect of the testimony was to prove that the defendant had once been a member of the Baptist church in good standing and had been expelled therefrom for some cause which the church deemed sufficient. The purpose of the People in giving this evidence was to discredit the defendant as a witness. It was very important testimony and may have placed a heavy hand upon the defendant upon his trial for crime. The exact effect upon the jury we cannot predict, as such evidence affects different minds differently, but upon a jury carefully drawn from a law-abiding and religious community the effect must have been disastrous to the defendant. The question now is whether that evidence was competent. We will discuss this in connection with a difficulty which we shall presently meet and in connection with the authorities to be presented.

Upon the cross-examination of the defendant by the district attorney, that officer holding in his hand what purported to be charges of the Bar Association of Rochester against the defendant as an attorney, and for which proceedings for disbarment had occurred, asked a question and the following proceedings occurred: "Q. You were suspended from the practice of law by the Supreme Court of this State? [Objected to by defendant's counsel as incompetent and immaterial. Received and exception by defendant.] A. Yes, sir; I was. Q. And you were suspended upon the charges which were those which I have already shown you? [Mr. Van Voorhis objected as incompetent and immaterial and upon the further ground that the charges are not in evidence. Received, exception by defendant.] A. I say I was suspended. I do not answer that by either yes or no because I was not suspended upon all of the charges. Q. There was one of them that you were not suspended upon? [This was objected to as incompetent and immaterial. Received and defendant excepted.] A. Yes, sir; there was one. Q. These charges were tried before a referee, Mr. Farnum? A. The testimony was taken before him. They were not tried before him. Q. You were sworn as a witness upon those proceedings? A. Yes, sir. Q. And the referee made his report to the Appellate Court of this State of the facts? [Same objection by defendant's

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counsel, ruling and exception.] (Not answered.) Q. Did either the referee or the Supreme Court find you guilty? [Same objection by defendant's counsel. Same ruling and exception.] A. The Supreme Court did and the referee reported against me, but the referee did not try me on any of them. * * * Q. Isn't it true that one of the charges upon which you were tried and found guilty and disbarred was that John J. Rudman was appointed executor of the estate of Betsy Benham, and that you acted as attorney for John J. Rudman and caused said Rudman to invest on a bond and mortgage made by Mary Curran for \$313.00 and the sum of \$675.00 on a bond and mortgage by Louisa Schaad for \$1,350.00, and upon a bond and mortgage by William Sanbun, all of whom were clients of yours, and that you thereafter received payments of such mortgages and did not pay the same over to said Rudman as executor? Wasn't that one of the charges? [Mr. Van Voorhis objected as incompetent and immaterial, and further upon the ground that he cannot prove the contents of a written paper in that way. Received, exception by defendant.] A. That was one of the charges. Q. And wasn't one of the charges that was made against you by the Bar Association and upon which you were found guilty and disbarred, that one Margaret McGill, of the city of Rochester, retained you to act as her attorney and procured a loan upon her property at No. 38 Penn street in the city of Rochester of one Murdock, and that you did procure said Margaret McGill to execute a mortgage for \$900 on her said property to one Mary S. Chapman, and caused said mortgage to be recorded in the Monroe county clerk's office, and did you receive from said Mary S. Chapman an assignment of the mortgage held by you, held by one John Motley for eight hundred dollars, and her check for \$90.00, and that you sold said mortgage to one G. Denton Smith for the sum of \$760.00, and his check of \$50.00, and converted the same to your own use? [Mr. Van Voorhis objected as leading, incompetent and immaterial and as putting in evidence the contents of a paper without introducing the paper itself. Received and exception by defendant.] A. I think that is the substance of the charge which was found against me by the referee, and affirmed by the Appellate Court of this department. Q. And wasn't one of the charges which was made against you, and on which you were tried, found guilty and disbarred, that you

falsely represented to one Mary and Charles Williamson, while you were acting for them as attorney, that Charlotte A. Lord then held a mortgage for the sum of \$800.00 upon the property of said Williamsons, and desired them to make a payment of \$200.00 upon the principal sum of said mortgage, and that in consideration of such payment she would reduce the rate of interest upon the balance of said mortgage, being the sum of \$600, to five per cent, and that relying upon said representations that Charles and Mary Williamson, or one of them, paid you as attorney the sum of \$200.00, to be by you paid to said Lord upon the mortgage held by her, and that you converted said \$200.00 to your own use, with the intent of converting it to your own use? [Same objection as before. Same exception by defendant; same ruling.] A. That was one of the charges which was reported against me by the referee, and which was affirmed by the Appellate Court of this department. Q. And upon which you were disbarred? A. Certainly I was disbarred. Q. Was also one of the charges upon which you were found guilty and disbarred that upon the 27th day of May, 1895, when Mary Williamson was subpoenaed by the district attorney of the county of Monroe to appear before the grand jury of the county of Monroe, then in session at the city of Rochester, and to bring with her certain receipts then held by said Mary Williamson relating to the mortgage referred to in my last question, that you then and there advised said Mary Williamson not to appear before the grand jury pursuant to said subpoena, and advised her that no harm would come to her if she did not come before the grand jury in obedience to said subpoena? [Same objection, ruling and exception by defendant.] A. That was the substance as I remember of that charge, which was found against me by Referee Farnum, whose report was affirmed by the Supreme Court of this department, and I was disbarred. Q. Wasn't it one of those charges that were made against you, and upon which you were found guilty and disbarred, that on the 12th day of August, 1893, Mrs. Munson gave her check for the sum of \$1,000.00, and handed the check to her husband to be delivered to you, and it was so delivered, to be used by you in the purchase of the mortgage known as the Baird mortgage, on the residence of Dr. Riggs, upon Rutger street, and that you never applied it to that use, but applied the money to your own use.

[Same objection, ruling and exception by defendant.] A. That was one of the charges that the referee reported against me, and his report was affirmed by the Appellate Division of the Supreme Court."

These questions and answers indicate, and the record discloses, that prior to the trial of Dorthy for larceny proceedings had been taken by the Bar Association of Rochester upon the charges indicated by the above questions, and others, to disbar Dorthy, and, upon application to the General Term of the fifth department, a referee had been appointed, who took evidence, and sustained by his report all but one of the eight charges which had been preferred against the defendant, and that this court had affirmed the report of the referee and disbarred the defendant. All of the evidence was called out upon this subject by the district attorney, over strenuous objections by the defendant's counsel, except such as the defendant gave upon his re-direct examination, after the foregoing questions had been answered by the defendant. The matter was wholly collateral to the matters in issue upon the trial of the defendant, and was concededly introduced for the purpose of discrediting him as a witness. The effect of these questions and answers was to show that the referee and the Appellate Division of the Supreme Court had, in this proceeding, convicted Dorthy of several larcenies not connected with the one upon which he was on trial, and of one attempt to suppress testimony which should have been submitted to the grand jury. The learned district attorney insists that it was proper to interrogate the defendant and call out this evidence from him, because it proved facts of misconduct and crime on his part which it was competent to show for the purpose of destroying his credit as a witness. This we deem an extraordinary proposition, in view of the settled law of this State. The proposition is simply this, that it is competent to ask a witness upon cross-examination not as to his own acts, but as to the acts, conclusions and opinions of others, not in a criminal proceeding, not upon a conviction for crime, not upon a trial in accordance with rules of criminal law, but in a civil proceeding; in an investigation to determine whether a man should be turned out of a church or a society or a bar association, or deprived of the privilege of practicing law or of some other franchise. The Court of Appeals of this State has directly declared against this proposition in several cases.

In *Nolan v. Brooklyn City & N. R. R. Co.* (87 N. Y. 63, 68) an exception was taken to the ruling of the court permitting a witness to be asked on his cross-examination if he had been expelled from a fire department. The court said the question was improper because the fact sought to be proved was neither pertinent to the issue nor did it relate to any specific fact which tended to discredit the witness or impeach his moral character.

In *People v. Brown* (72 N. Y. 571) the rule was laid down that, where a defendant in a criminal action takes the stand as a witness in his own behalf, he is subject to the rules applicable to the examination of other witnesses, and is not thereby deprived of his rights as a party; his counsel may speak for him while he is a witness, and an error committed by the court against him may inure to his benefit as a party, and that it was error to ask such a witness how many times he had been arrested.

In *People v. Crapo* (76 N. Y. 288) it was also held to be error to ask a defendant in a criminal case if he had been arrested.

In *Ryan v. People* (79 N. Y. 593) it was held that it could not be shown by a witness upon his cross-examination that he had been indicted for an offense.

In *Lindsley v. Miller* (3 App. Div. 127, 128) this court held that it was not competent in order to affect the credibility of a witness, to ask him if "he had never been charged with 'crooked driving,'" and "if he had recently been taken out of his sully at Syracuse for 'crooked driving.'" FOLLETT, J., said: "The purpose of the question was to affect the defendant's credibility, and the tendency of it and of the answer was to prejudice him before the jury. It is well settled in this State that it is not competent to ask a witness on his cross-examination, for the purpose of affecting his credibility, if he has been charged with crimes or misdemeanors, or if he had been turned out of a social organization." Citing many cases.

At common law persons convicted of infamous crimes were excluded from being witnesses altogether, but by statutes adopted in most of the United States the disqualification of infamy is removed, and the conviction may be proved to affect credibility (1 Whart. on Ev. § 397), and by our Penal Code (§ 714) a person convicted of a crime is a competent witness in any cause or proceeding, civil

or criminal, but the conviction may be proved for the purpose of affecting the weight of his testimony, either by the record of a conviction or by his cross-examination.

The rule goes no further than to permit the witness to be asked as to specific facts or acts in his own career which tend to discredit him or to impeach his moral character, and that only to a reasonable extent within the discretion of the court, subject to review, however, if that discretion is abused (*Ryan v. People, supra*; *The People v. Irving*, 95 N. Y. 544-546 and cases cited; *Spiegel v. Hays*, 118 id. 660), and this was a modification of the rule which did not permit the examination into specific acts of a witness to discredit him. (1 Whart. on Ev. § 56.)

Judge CHURCH said in *People v. Crapo (supra)*, at page 291, as late as 1879, in quoting from Greenleaf: "The great question, however, whether a witness may not be bound in some cases to answer an interrogatory to his own moral degradation when, though it is collateral to the main issue, it is relevant to his character for veracity, has not yet been brought into direct and solemn judgment, and must, therefore, be regarded as an open question."

This statement indicates the extreme caution with which the courts have at last reached the conclusion that a witness may be compelled to testify as to collateral acts of his own, tending to prove his moral degradation, but it has never been the law that a witness may be compelled to testify to the conclusions of others to prove such moral degradation or to impeach him as a witness, except it be the conviction for a crime, or such confinement in prisons or jails as would indicate a conviction. The reason of this distinction is plain. Where a person is interrogated as to his own acts, he is supposed to be familiar with what he, himself, has done, and can give any explanation that may exist consistent with his innocence, and as the question is collateral to the issues on trial, his answer concludes the other side and he cannot be contradicted; but if he is interrogated concerning the acts and decisions of others, which tend to disgrace him, the case is different; he may not be able to protect himself by explanation; he may be ignorant of the facts upon which the acts or conclusions of others are based; the court will not stop to try the merits of such collateral accusations, and the witness may thus be injured and disgraced by results for which he is not responsible.

Section 714 of the Penal Code which we have cited above, has no application to this case.

A person under our system of jurisprudence can only be convicted of a crime after a fair trial in the appointed way, where he can be fully heard in his defense, and where he can be protected by all the presumptions with which the law surrounds a defendant upon his trial for crime. A conviction upon such a trial may be properly shown to impair the credit of a witness; though it is the act of others, it is the deliberate act of the law upon a trial duly had before the court and a jury.

But the proceeding to disbar an attorney under sections 67, 68 and 69 of the Code of Civil Procedure is a summary one. *It is not a trial.* It is simply an investigation. A copy of the charges must be delivered to the attorney, and he may be heard in an informal way in his defense; the result of the proceedings can only be a suspension or removal from the courts of the State. (§ 68.) If the attorney has been *convicted* of a felony, he may be disbarred for that reason alone.

As we have seen, a witness cannot be compelled to state whether he has been indicted. An indictment is an accusation from a body charged and sworn to investigate crime upon the oath of witnesses, and it acts judicially. If its conclusions cannot be shown to discredit a witness, upon what principle should charges made by a bar, or any other association, be given in evidence?

The Court of Appeals has said in the proceedings to disbar the defendant (152 N. Y. 601), that the effect of the "proceeding to disbar is not criminal and is not intended for punishment, but to protect the court from the official ministration of persons unfit to practice as attorneys therein."

The charges of the bar association and the report of the referee were simply charges, not facts, and did not prove facts, but in the estimation of the jury the disbarment of the defendant upon these serious charges by this court may have had all the effect of convictions for crime upon a trial duly had.

The learned trial court charged the jury upon this subject as follows, after speaking of this court having disbarred the defendant: "You have a right, therefore, to assume that they investigated these charges carefully; that they would not have disbarred the

defendant, who was charged with so many serious offenses, without having fully and carefully investigated the charges. So that, so far as these charges are concerned, we must take the decision of the Appellate Division as binding upon this court. But, gentlemen, while I lay down that as a rule of law, it is wholly immaterial as to what the Appellate Division may have held, unless it tends to impair the character or the credibility of Dorthy's testimony in this case; upon that point, and that point alone, it is material." The evidence was, therefore, permitted to have its full force and effect as establishing the charges of criminality on the part of the defendant for the purpose of impeaching him.

In admitting this evidence the learned trial court was doubtless influenced by the case of *The People v. Reavey* (38 Hun, 418), where the defendant was convicted of larceny in the second degree and while upon the stand as a witness he was asked upon cross-examination if he had been suspended by the action of the Supreme Court from his office as attorney and counselor. Judge DANIELS held that this was competent as affecting his credibility, upon the authority of *The People v. Irving* (*supra*).

With all due respect to the learned judge, we do not see that *The People v. Irving* sustains this ruling. The distinction between showing the witness' own acts and the acts of others to impeach him, which we have pointed out, does not seem to have occurred to the learned judge.

Judge FINCH in *The People v. Irving* (at page 544), in commenting upon *Nolan v. Brooklyn City* (*supra*), clearly pointed out the distinction in this pithy statement: "There the witness was asked not what *he* had done, but what the fire department had done; whether it had expelled him."

But *The People v. Reavey* is no authority for proving under the guise of a proceeding to suspend an attorney the charges made against him upon which that suspension was obtained. The mere fact only of the suspension was shown; that is very different from the case at bar, where the prosecution sought to prove the charges upon which the disbarment was founded and to establish that several distinct felonies had been committed by the defendant. These different offenses the prosecution would not have been permitted to

show upon any criminal trial for another crime unless it was proper to establish the intent with which the defendant committed the crime for which he was being tried.

That the evidence of the charges against the defendant and of his disbarment was most prejudicial to him cannot be denied.

Upon the trial there was a closely contested question of fact as to whether the defendant received the \$250 as the agent and in a fiduciary capacity or whether he received it upon a claim which he made in good faith for services rendered in the action of *Rich v. Tiffany*. Several witnesses testified in behalf of the defendant sustaining his side of this issue; witnesses testified to sustain the side of the People, and circumstances and facts were adduced by the People to the same end. The defendant was the most important witness in his own behalf, and if he were disgraced and discredited his conviction was quite certain to follow. We should not permit his conviction to stand if it has been or might have been secured by incompetent or illegal evidence; that much of this evidence was incompetent, especially that portion most dangerous to the defendant, seems to us entirely clear. The evidence before the jury that the defendant had been expelled from the church; that he had been expelled from the bar on charges of numerous crimes and for gross misconduct in the discharge of his professional duties, we may safely assume, substantially destroyed all credit as a witness which the jury might otherwise have given him.

These conclusions lead to a reversal of the judgment appealed from.

The remaining point, the denial of the motion for a new trial upon the ground of newly-discovered evidence, it is hardly necessary to consider in view of the conclusions thus reached, but we will dispose of that motion also.

Late in the history of this case, and after the appeal had been taken to this court, the defendant claimed that he had just discovered a letter from William G. Rich dated July 20, 1895, which was not admitted in evidence upon the trial, but was exceedingly material and important to him upon such trial. An examination of that letter fails to disclose the importance attached to it by the defendant. At most it was but cumulative evidence, and under the circumstances under which it came to light it should not constitute a

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ground for a new trial. At least such was the opinion of the learned trial judge who wrote a careful and well-considered opinion upon the subject, in which we concur.

The judgment and the order denying the motion for a new trial, made upon the minutes, should be reversed and a new trial granted.

All concurred, except ADAMS, J., dissenting, and FOLLETT, J., not sitting.

HARDIN, P. J. (concurring):

The statute gave to the defendant the opportunity of being a witness in his own behalf, and he availed himself of the provisions of the statute.

In *People v. Tice* (131 N. Y. 656) ANDREWS, J., said: "The accused is not compelled to become a witness. When he avails himself of the privilege conferred by the statute, he subjects himself voluntarily to the situation of any other witness, and if he is compelled to answer disparaging questions, or to give evidence relevant to the issue, which is injurious, it is the consequence of an election which he makes to become a witness, which involves a waiver on his part at that time of the constitutional exemption. If he accepts the privilege given by the statute, he takes it with its attendant dangers. 'His own act is the primary cause; and, if that is voluntary, he has no reason to complain.' (CHURCH, Ch. J. *Connors v. People*, 50 N. Y. 240.) The principle that an accused person, who becomes a witness in his own behalf, thereby places himself in the attitude of any other witness in respect to the right of cross-examination, has been announced in many cases in this court. (*Brandon v. People*, 42 N. Y. 265; *Connors v. People*, *supra*; *Stover v. People*, 56 N. Y. 315; *People v. Casey*, 72 id. 394.) * * * This being the construction put by our courts upon the statute, there is no constitutional right infringed *if the accused, having elected to take the stand as a witness, is subjected to the ordinary rules of examination*. The range and extent of the cross-examination is within the discretion of the trial judge, provided only that it relates to relevant matters or to matters affecting credibility."

The same principle was referred to and stated in *Nolan v. B. C. & N. R. R. Co.* (87 N. Y. 68); and, in disposing of the ruling

compelling a witness to state that he had been expelled from the fire department, the opinion states: "The question was improper because the fact sought to be proved was neither pertinent to the issue, nor did it relate to any specific fact which tended to discredit the witness or impeach his moral character."

That case was referred to with approval in *People v. Irving* (95 N. Y. 544), and the same judge who prepared the opinion in the former case stated in the latter case: "There the witness was asked not what he had done, but what the fire department had done; whether it had expelled him. * * * An expulsion from the fire department might be summary or arbitrary and with little or no chance of a fair trial, or for causes involving no crime and not affecting the moral character."

In *People v. Oyer & Terminer* (83 N. Y. 438) it was held that "the range and extent of a cross-examination is, as a general rule, within the discretion of the court, subject to the limitation that it must relate to matters pertinent to the issue or which tend to discredit the witness or impeach his moral character."

It is difficult, upon an inspection of the record (p. 396), to discover how the fact that the defendant was once a member of the Baptist church was relevant to the issue, or tended to affect his credibility. Nor do we see how the fact that he was not, at the time he was cross-examined, a member of the church, was pertinent to the issue or tended to impair his credibility. He may have resigned or voluntarily severed his connection with the church.

The prosecution propounded to the witness a question which assumed that the church "had withdrawn from you (him) the hand of Christian fellowship," and required the witness to answer what communication he had made bearing upon the subject of his intention to "still continue to work in the cause of Christ." That question was objected to as incompetent and immaterial, and upon the further ground that "any statement he made in a letter can only be proved by the letter." Notwithstanding those objections, the court allowed the evidence against the defendant's exception. The question propounded in behalf of the People, and the answers which the witness was compelled to deliver, brought out the fact that the Baptist church "had withdrawn" from the defendant "the hand of Christian fellowship."

The defendant, therefore, in cross-examination, was compelled to prove the action of another body, adverse, apparently, to his standing in the church, and, as is said in respect to evidence compelling a witness to state that he had been expelled from the fire department, it was the act of another body, and not the act of the defendant or the witness. Under well-settled rules that charges or accusations or even indictments or arrests, may not be inquired into, "since they are consistent with innocence, and may exist without moral delinquency," it seems the exceptions taken by the defendant present error. (*People v. Irving, supra*; *Greaton v. Smith*, 1 Daly, 380; *Von Bokkelen v. Berdell*, 130 N. Y. 141; *Lindsley v. Miller*, 3 App. Div. 128.) And it is pertinently suggested in the opinion of WARD, J., that such error worked harm to the defendant. And, notwithstanding the rule of section 542 of the Code of Criminal Procedure, to the effect that "exceptions which do not affect the substantial rights of the parties" shall not affect the judgment to be given by an appellate court, the conviction, which may have been seriously influenced by such improper evidence, should not be allowed to stand. (*People v. Doyle*, 11 App. Div. 448; *People v. Chacon*, 102 N. Y. 669; *People v. Dimick*, 107 id. 13.)

The foregoing views lead to the same result stated in the elaborate opinion of WARD, J., in which I concur.

Judgment of conviction and orders reversed and a new trial directed, and proceedings remitted pursuant to section 547 of the Code of Criminal Procedure.

Cases
DETERMINED IN THE
FIRST DEPARTMENT
IN THE
APPELLATE DIVISION,
August, 1897.

LOUIS KAISER, as Administrator, etc., of SIDNEY KAISER, Deceased,
Respondent, v. COLIN McLEAN, Appellant.

*Negligence — the lamplighter of a contractor for a railroad structure chasing a boy
who ran on the tracks and was killed.*

Proof that a person employed by a contractor, engaged in building an elevated railroad structure, to light lamps at the work and to keep the boys away, chased a boy, upon the structure, away from it, and that the boy, between whom and such person, and on the east side of the railroad tracks, were a number of long timbers, the boy being upon the west and the employee upon the east side thereof, ran to the west through an opening in a wall guarding the railroad tracks and was there killed by a train, when he, being familiar with the situation, might with safety have run in another direction as did his companions, does not create a liability upon the part of the contractor for the death of the boy.

O'BRIEN, J., dissented.

APPEAL by the defendant, Colin McLean, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 27th day of January, 1897, upon the verdict of a jury, and also from an order entered in said clerk's office on the 9th day of February, 1897, amending said judgment, and also from an order entered in said clerk's office on the 1st day of March, 1897, denying the defendant's motion for a new trial made upon the minutes.

Albert B. Boardman, for the appellant.

Louis J. Vorhaus, for the respondent.

VAN BRUNT, P. J.:

This action was brought against the appellant McLean and the New York Central and Hudson River Railroad Company for damages arising from the death of one Sidney Kaiser, deceased. The appellant McLean was a contractor employed by the railroad company to build the elevated structure south of the Harlem river upon which its tracks now rest. The plaintiff's intestate was struck by one of the company's trains and killed on the 13th of August, 1894, at or near the intersection of Park avenue and One Hundred and Sixteenth street. As a part of the construction plant the appellant employed a machine, constructed of heavy timbers, called a traveler, which was moved along the road as the work progressed. It would appear that, in connection with this traveler, there were a number of long timbers lying north and south near the edge of the cut where the railroad tracks were. These timbers were lying on the roadbed of Park avenue, on the east side of the railroad tracks. The stone wall, which formerly ran along the edge of the cut on each side of the railroad tracks, had been torn down at and in the neighborhood of One Hundred and Fifteenth street. The appellant employed one Hanafin as lamplighter. This witness testified that he was hired to keep the lamps lighted and to keep the boys away from his lamps. On the day in question, about seven o'clock in the evening, while some boys, including the deceased, were playing upon the logs mentioned, Hanafin came, with his lamps lighted, upon the structure. He put one of the lamps down, and then, for the purpose of driving the boys off the structure, he picked up something, some of the witnesses stating that it was a stone, and threw it at the boys. One witness states that he saw him chase the boys; that the other boys ran away, and that Hanafin ran after Kaiser and chased him right on the track. This same witness, however, states that Hanafin was all the time on the east side of the logs, and the logs, therefore, were between him and the boys. Another witness states that Hanafin picked up a stick and the boy went through the opening of the wall and ran upon the tracks, and, a train coming along, he was killed.

Upon this state of facts the jury found a verdict in favor of the plaintiff, and from the judgment thereupon entered and from an order denying a motion for a new trial this appeal is taken.

It is difficult to see upon what theory the defendant can be held liable for the act of Hanafin, even if it was wrongful. There was no evidence that he was employed or authorized by his employer to commit any assault upon anybody in keeping his lamps lighted and the boys away from them. In order to hold a principal for the act of his servant, it must be shown that the act of the servant comes within the scope of his employment; and the master is not answerable for the willful wrong of the servant or for any force or violence used by him unless he was authorized so to do, except, perhaps, in the case of a common carrier. In the case at bar there does not seem to be any proof whatever that Hanafin was authorized to do anything more than to prevent these boys from interfering with the lamps and to keep them burning, and any violence which he used towards the boys was a wrongful act upon his part for which the defendant is not responsible.

But it seems to us that there is an additional reason why the defendant was not liable for the damage resulting from the killing of the plaintiff's intestate. It is true that one of the witnesses states, as already observed, that Hanafin chased the boy right upon the track. But it is manifest from the testimony in the case that this is absolutely untrue, as the same witness swears that Hanafin was on the east side of the logs, and hence that he could not have chased the deceased upon the track, because the logs were between him and the deceased. The evidence is positive in regard to this matter. It is undoubtedly true that Hanafin drove the boys from the logs, but there was nothing in the world which compelled the deceased to go through the opening in the wall upon the railroad track. He could have gone in the direction in which the other boys went with perfect safety, and, being a resident of the neighborhood, he was acquainted with the situation, knew of the existence of the tracks and of the passage of trains thereon. Under these circumstances, wrong cannot be imputed to the defendant appellant. Hanafin had the right to prevent these boys from interfering with the lights placed there for the purpose of giving warning to the public of these obstructions and to keep the boys away from the structure; and if they, being wrongfully there, in running away, went into danger, it is difficult to see upon what theory even Hanafin can be said to be responsible.

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Upon the whole case, we are of opinion that the judgment should be reversed and a new trial ordered, with costs to the appellant to abide the event.

RUMSEY and PATTERSON, JJ., concurred · PARKER, J., concurred in the result; O'BRIEN, J., dissented.

Judgment reversed, new trial ordered, costs to appellant to abide event.

HENRY A. RICHARDSON, Appellant, v. THE SUN PRINTING AND PUBLISHING ASSOCIATION, Respondent.

Motion papers to open a default in pleading — they should contain a copy of the proposed answer — costs not granted to abide the event.

Motion papers used to open a default in answering must contain a copy of the proposed answer.

Where such a motion is granted, costs should not be granted to abide the event.

APPEAL by the plaintiff, Henry A. Richardson, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 4th day of June, 1897, granting the defendant's motion to open a default and to plead in the action, with costs of the motion to abide the event.

Joseph J. Corn, for the appellant.

Franklin Bartlett, for the respondent.

PER CURIAM :

The motion papers were defective in that they contained no copy of the proposed answer. (*Reynolds v. Palen*, 13 Civ. Proc. Rep. 200; *Phillips v. Equitable Life Ass. Soc.*, 26 N. Y. Supp. 522.) This objection was not waived, but was taken in the form of an affidavit made by one of the attorneys for the plaintiff. It was error to direct that costs of the motion should abide the event. It held out to the defendant the promise of a reward as a premium upon its default in case the action were determined against the plaintiff.

The order should be reversed, with ten dollars costs and printing disbursements, and the motion denied, with ten dollars costs, but with leave to renew upon other papers.

Present — VAN BRUNT, P. J., RUMSEY, PATTERSON, O'BRIEN and PARKER, JJ.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs, but with leave to renew upon other papers.

MARIE LOWENTHAL, as Executrix, etc., of HERMAN LOWENTHAL,
Deceased, Appellant, v. ALFRED D. LEONARD, Respondent.

Inspection and discovery of the books of a deceased physician—when it will not be granted before trial where the books contain confidential statements of his patients.

An order for an inspection and discovery of the books of a deceased physician, which contain records of privileged and confidential statements made to him by his patients, should not be granted on the alleged ground that they would show entries tending to prove that false representations as to the volume of his business had been made by the physician to the moving party, by which the latter was induced to enter into a contract with him, when it does not appear that all the information thus available may not be obtained from such books produced under subpoena at the trial.

APPEAL by the plaintiff, Marie Lowenthal, as executrix, etc., of Herman Lowenthal, deceased, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 19th day of May, 1897, granting the defendant's motion for a discovery and inspection of the plaintiff's books.

Herbert Reeves and Ambrose G. Todd, for the appellant.

Philo P. Stafford and Charles Donohue, for the respondent.

PER CURIAM:

This order should be reversed. A sufficient reason for an inspection and discovery before the cause is brought to trial was not

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shown It was claimed by the moving party that the books of the plaintiff's testator would show that entries are contained therein tending to prove false representations made by the testator as an inducement to the defendant to enter into the contract with him referred to in the moving papers. But the books, an inspection of which is sought, are of such a character, containing as they do the records of privileged and confidential statements of patients made to a deceased physician, that the order allowing extracts or data from them should not have been made. Marie Lowenthal swears that all of the entries in the books contain memoranda of information and communications received from the patients of the testator, who was, at the time the entries were made, a practicing physician. It is not shown that all the information the defendant desires from them for a legitimate purpose may not be had at the trial as well as before the trial. These books are in the possession of the plaintiff and can very readily be produced at the trial under subpoena. The extent of the business of the plaintiff's testator, so far as that may be determined from the record of persons treated by him at his house, can be made just as available at the trial as before, and on the trial, under the direction of a discriminating judge, there can be no abuse of the right of examination of the books, or betrayal of the confidential matter which is recorded in them.

The order appealed from should be reversed and the motion denied, with ten dollars costs.

Present — VAN BRUNT, P. J., RUMSEY, PATTERSON, INGRAHAM and PARKER, JJ.

Order reversed and motion denied, with ten dollars costs and disbursements.

LEO OPPENHEIM, Appellant, v. JACOB LEWIS and Others,
Respondents.

Res adjudicata by an order—replevin—a dismissal of the complaint as to the defendants other than the sheriff—it does not authorize a direction to the plaintiff to return to the sheriff the chattels replevied.

An order not appealed from and unreversed is conclusive against the right of the moving party to the same relief on a second motion.

Semble, that where the complaint, in an action of replevin, is dismissed as to defendants, other than the sheriff, and no right is reserved to them to make any further application in the matter, they are not entitled to an order directing the return to the sheriff by the plaintiff of the goods which he had replevied.

APPEAL by the plaintiff, Leo Oppenheim, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 4th day of January, 1897, directing the return of certain personal property to the sheriff of the county of New York, from whose possession it was taken by the plaintiff.

Wales F. Severance, for the appellant.

Abr. R. Joseph, for the respondents.

PER CURIAM:

It appears from the papers in this case that the complaint was dismissed as to the defendants Lewis and Fordinsky on the 25th of August, 1896. The order dismissing that complaint reserved no right to make further application, and that order stands without modification. Subsequently, and on the 2d of October, 1896, a motion for the same relief which was granted herein was made at a Special Term held by Mr. Justice RUSSELL, who denied the motion, and that order stands unappealed from and unreversed. That order is a conclusive decision against the right of the defendants to have the relief which they asked for here.

The question as to the right to grant such relief in an action of a similar nature was submitted to the court in the case of *Sheehan v. Golden* (85 Hun, 462), in which it was held that the defendants

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other than the sheriff, upon dismissal of the complaint, were not entitled to judgment that the goods replevied be delivered to the sheriff.

For these reasons the order should be reversed, with ten dollars costs and disbursements.

Present — PATTERSON, RUMSEY, WILLIAMS, O'BRIEN and PARKER, JJ.

Order reversed, with ten dollars costs and disbursements.

SAMUEL FOX, Respondent, v. WARNER MILLER, Appellant.

Usury — examination of the plaintiff before trial — objection that it will require the disclosure of facts constituting a crime.

Where an order for the examination before trial of a plaintiff, bringing an action upon a promissory note, is based upon an affidavit of the defendant alleging that he will rely upon the defense of usury; that he is ignorant of the details of the transaction and of the facts necessary to be pleaded in connection therewith, and has no other means of ascertaining them, the plaintiff cannot successfully resist such examination by asserting that the examination will compel him to disclose facts which will constitute a criminal offense, where there is nothing in the record to show that the crime of usury, as defined by the statute, has been committed.

APPEAL by the defendant, Warner Miller, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 23d day of June, 1897, vacating an order for the examination of the plaintiff before trial.

Frank Walling, for the appellant.

Edgar L. Nathan, for the respondent.

PER CURIAM:

The order for the examination of the plaintiff was properly granted. The defendant by his affidavit showed that the note was diverted by Brandreth, and that the defense of usury would be relied upon, and also that he was ignorant of the details of the

transaction, and of the facts necessary to be pleaded in connection with that defense. The plaintiff objected to the order on the ground that the examination would compel the disclosure of facts which would constitute a criminal offense. There is nothing in the record before us to show that the crime of usury has been committed; that anything was received by the plaintiff for the loan or forbearance of any money, or that any facts existed which would render the plaintiff liable to criminal prosecution under the statute. The defense of usury could be based alone upon a corrupt agreement to receive more than six per cent for the loan or forbearance of money, and the proof of such an agreement would be sufficient to establish that defense.

The affidavits upon which the order for examination was granted show that the defendant has no other means of ascertaining the facts necessary to be pleaded by him in setting up the defense of usury than by an examination of the plaintiff to elicit those facts which are especially within his knowledge.

The order should be reversed, with ten dollars costs and disbursements, and the motion denied, with ten dollars costs.

Present — PATTERSON, RUMSEY, WILLIAMS, O'BRIEN and PARKER, JJ.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.

MICHAEL ROSA, an Infant, by LUCIETTA ROSA, his Guardian ad Litem, Appellant, v. SECOND AVENUE RAILROAD COMPANY, Respondent.

Suing in forma pauperis — payment of the costs of a former action and security for future costs, not required.

Where a petition which has been presented for leave to prosecute as a poor person is sufficient in form, and an order has been made granting the application, it is erroneous for the court subsequently to vacate such order, upon proof that costs of a former action between the same parties were due and unpaid by the plaintiff to the defendant, and to make an order staying the plaintiff's proceedings until their payment, and requiring him to give security for the costs of the pending action.

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APPEAL by the plaintiff, Michael Rosa, an infant, by Lucietta Rosa, his guardian ad litem, from an order of the Supreme Court, made at the New York Special Term, and entered in the office of the clerk of the county of New York on the 30th day of June, 1897, vacating an *ex parte* order allowing the plaintiff to sue as a poor person, staying the plaintiff's proceedings until the payment of costs previously adjudged against him, and requiring him to furnish security for costs.

Benjamin Patterson, for the appellant.

Charles C. Nott, Jr., for the respondent.

PER CURIAM :

The petition presented to Justice PRYOR, upon the application of the plaintiff for leave to prosecute as a poor person, fully complied with the requirements of the statute, and for that reason it was proper to grant the application. (*Feier v. Third Ave. R. R. Co.*, 9 App. Div. 607.) It was not proper to set aside the order granting that permission, unless it was made to appear either that some material facts were misstated, or that facts were suppressed which, if considered, should have required the court to refuse leave to prosecute as a poor person. No such condition of affairs is made to appear. If all the facts shown by this record had been made to appear to the justice to whom the application for leave to prosecute as a poor person was made, he would have known that certain costs of a former action adjudged to be paid by the plaintiff to the defendant had not been paid. But that fact was not sufficient to prevent the plaintiff from prosecuting this action. For that reason it was not proper to vacate that order. So long as that order stood, the remainder of the order staying the plaintiff's proceedings until the payment of those costs and requiring the plaintiff to give security for costs of this action was clearly improper. For that reason the order appealed from should be reversed, with ten dollars costs and disbursements, and the motion denied, with ten dollars costs.

Present — PATTERSON, RUMSEY, WILLIAMS, O'BRIEN and PARKER, JJ.

Order reversed, with ten dollars costs and disbursements.

FRANCIS W. SEAGRIST, JR., Appellant, v. FRANCIS S. K. SIGRIST and EDWARD P. ORRELL, Executors, etc., of NICHOLAS SEAGRIST, Deceased, Respondents, Impleaded with Others.

Irregular judgment—the remedy is by motion and not by appeal—difficult and extraordinary case—additional allowance.

If a judgment in an action is irregular, because it should not have been entered in favor of defendants who were not served or who had not appeared in the action, the remedy is not by appeal, but by a motion to set the judgment aside. An action to set aside a will held to be a difficult and extraordinary case. An additional allowance of \$1,000 held, under the circumstances of the case, to be excessive.

APPEAL by the plaintiff, Francis W. Seagrist, Jr., from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of New York on the 15th day of April, 1897, upon the dismissal of his complaint by direction of the court after a trial at the New York Trial Term, and also from an order entered in said clerk's office on the 15th day of April, 1897, granting an additional allowance of costs in the sum of \$1,000.

Edward S. Clinch, for the appellant.

Edward W. S. Johnston, for the respondents.

RUMSEY, J. .

The action was brought under the provisions of section 2653a of the Code of Civil Procedure, to procure a judgment declaring invalid the probate of the will of Nicholas Seagrist. Several of the defendants, among whom were the executors of Nicholas Seagrist, appeared and answered, but others did not appear, and some of them were not served with process. While the action was in this condition a motion was made by the plaintiff for leave to discontinue, which was granted upon terms which seem not to have been accepted, and thereupon the case having been put upon the calendar, was reached and in its order, and upon motion of the executors the complaint was dismissed as against them and another defendant who had appeared. A motion was subsequently made by the executors for an extra allowance, and the sum of \$1,000 was awarded to them upon that motion as an additional allowance of costs. After

that had been done, the executors entered judgment dismissing the complaint as to all the defendants. The plaintiff appeals from this judgment, as well as from the order granting the additional allowance of costs.

So far as the appeal from the judgment is concerned, it is only necessary to say that the remedy of the plaintiff is not by appeal. If the judgment is irregular for the reason that it should not have been entered in favor of those defendants who were not served or who had not appeared in the action, the remedy of the plaintiff was by motion to set aside the judgment for irregularity. The judgment, therefore, must be affirmed upon the appeal.

In cases of this kind the granting of an extra allowance is necessarily much in the discretion of the trial court. Whether the circumstances and the surroundings of the action make it difficult and extraordinary, within the meaning of the section of the Code, is a matter largely to be determined by the court before which the action is tried, and it is only where an abuse of the discretion is plainly shown that an appellate court will undertake to say that such an allowance will not be granted. There were circumstances surrounding this case which might well lead a trial court to the conclusion that the action was difficult and extraordinary. It was not at all certain that the action could not be maintained by the plaintiff, and if it might have been maintained, it was quite evident from the proceedings already had before the surrogate, that the preparation for trial would be expensive, and the trial itself would be long and tedious. The whole matter had been tried out before the surrogate, and at the time this action was commenced the case was about to be argued in the Appellate Division, or had already been argued in that court. It was fair to infer that this action was brought, not solely for the purpose of settling the validity of the will of Nicholas Seagrist, but to enable the plaintiff to delay for a considerable period of time the settlement of the estate, and possibly to tax it with a large bill of costs for the purpose of litigating over again in the Supreme Court the very questions which had been fully tried before the surrogate, or which, if the decree of the surrogate was reversed, would necessarily be tried in the Supreme Court by a jury. In view of that fact, the court which granted this motion might well

have said that the circumstances surrounding the case were such as to bring it within the section of the Code which authorizes the granting of an allowance in difficult and extraordinary cases.

The object for which the action was brought was to set aside the probate of the will of Nicholas Seagrist. This will disposed of the entire property of the testator, amounting to over \$200,000. If the plaintiff recovered a judgment in the action, it would necessarily affect the disposition of all the property of which Nicholas Seagrist died the owner, and would transfer that property from the persons to whom it was given by the will to the persons who would be entitled to it if he died intestate. The amount involved, therefore, was the full amount of the property of the testator, something over \$200,000, and that was the amount upon which the additional allowance might have been estimated. But in spite of all that, we are inclined to think that it was not proper to fix the allowance at so great an amount as \$1,000. It does not appear that the preparation for the trial on the part of the defendants was actually made. The only expense which seems to have been actually incurred in the action was the retaining of counsel and the payment of the counsel fee; and we think that a less sum than \$1,000 was all that was required in the case for the indemnity of the defendants, which is the true ground upon which an allowance is granted in such cases. The sum of \$250 we think would be sufficient to indemnify the defendants for their additional expense incurred in the action, and the order granting an additional allowance is modified by reducing the allowance from \$1,000 to \$250, and the judgment entered is modified in the same way, without costs to either party of the appeal from the order.

Judgment affirmed, with costs, and order modified as above, without costs to either party in this court.

VAN BRUNT, P. J., PATTERSON, INGRAHAM and PARKER, JJ., concurred.

Judgment affirmed, with costs, and order modified by reducing allowance to \$250, and as modified, affirmed, without costs.

JAMES REYNOLDS, Appellant, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Respondent.

Negligence — a passenger injured at a station by a sudden jerk of the train — when a verdict is against the weight of evidence.

When in an action brought to recover damages for an injury sustained by the plaintiff, while getting off a train, at a station reached before the one called for by his ticket, by reason of the train starting with a jerk, the plaintiff alone testifies to the sudden starting of the train and is contradicted by a number of witnesses, some of whom testify that the plaintiff attempted to leave the train before it stopped, a verdict in favor of the plaintiff was set aside.

APPEAL by the plaintiff, James Reynolds, from an order of the Supreme Court, made at the New York Trial Term and entered in the office of the clerk of the county of New York on the 15th day of February, 1897, setting aside the verdict of a jury in favor of the plaintiff and ordering a new trial.

Thomas P. Wickes, for the appellant.

Daniel W. Tears, for the respondent.

RUMSEY, J. :

The action was brought to recover damages for personal injuries received by the plaintiff while a passenger upon the train of the defendant going from New York to Yonkers, on the 6th of October, 1894. As the result of the trial the plaintiff recovered a verdict of \$2,500, which was set aside and a new trial ordered by the trial judge, upon the ground that the verdict was contrary to the weight of the evidence.

The claim of the plaintiff was that on the night of October 6, 1894, he had bought a ticket to go from New York to Yonkers; that when the train reached Kingsbridge he started to leave it, intending to take another train which reached Yonkers at a station nearer his house than the one upon which he was then riding; that as he was debarking from the train, after it had stopped at the station, it suddenly started with a jerk and he was thrown to the ground, his hand striking the track in front of the wheels, which passed over it and crushed it. He said that after he had fallen the

train was stopped and he was taken aboard again and taken to Yonkers. The ground of his complaint was that the train was started as he was getting off, without giving him an opportunity to step upon the ground. No other witness than he was sworn in his behalf on that subject, and the fact that the train was started as he was getting off of it stands upon his uncorroborated testimony. On the part of the defendant several witnesses were sworn upon that subject, some of whom testified that the plaintiff attempted to leave the train before it had stopped at the station and fell in his attempt. Others testified that the train, after stopping at the station and starting again, was not stopped until it reached the next station, and that it was not started and stopped after proceeding a short distance, as testified to by the plaintiff. Upon these two points the evidence was overwhelming, and while the testimony was that of interested witnesses, as was also the testimony given on behalf of the plaintiff with regard to the accident, yet there was so much of it, and it was so given, as to entitle it to very great weight. There was evidence in addition tending to show that the plaintiff, at the time of receiving the injury, was considerably intoxicated. That he had been drinking something was not denied, but he did deny that he was intoxicated; and in that respect he was corroborated by other witnesses, so that upon that subject there was a fair conflict of testimony. But the serious question in the case, as will be seen, was whether the train was started without giving the plaintiff an opportunity to leave it. In considering that question it must not be forgotten that the defendant's trainmen had no reason to suppose that the plaintiff was about to leave the train, because he had taken a ticket for Yonkers and the train had not yet reached that station. Upon the whole case, it is quite clear that the evidence in favor of the defendant was largely preponderating upon the vital question whether the train started while the defendant was getting off from it.

In such cases as this, where the trial judge who heard the testimony and saw the witnesses has set aside the verdict because it is against the weight of evidence, great weight is to be attached to his conclusion, and unless the appellate court can clearly see that he is wrong in his decision, the order granting a new trial should be affirmed.

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Such must be the result in this case, and the order must be affirmed, with costs to the respondent to abide the event of the action.

VAN BRUNT, P. J., PATTERSON, O'BRIEN and PARKER, JJ., concurred.

Order affirmed, with costs to the respondent to abide the event of the action.

PEOPLE OF THE STATE OF NEW YORK ex rel. JOHN CANAVAN and Others, Appellants, *v.* CHARLES H. T. COLLIS, as Commissioner of Public Works of the City of New York, Respondent.

Eminent domain—lands taken by statute for a city park—making subsequent changes therein, pending condemnation proceedings—mandamus.

Where a statute (Chap. 56, Laws of 1894) declares certain described lands to be a park, provides a complete scheme for their condemnation and requires the city of New York to proceed at once to appropriate the lands to the public use, the rights of the parties must be deemed to have been presently fixed by the statute; and where it also appears that testimony has been given by both the owner and the city, in condemnation proceedings already taken, as to the value of a parcel of the land, as it was when the statute was passed, persons having a permit or license from one of the owners of the land to dump earth upon it (a proceeding detrimental to the land as a park, and increasing the subsequent expense of adapting it to park purposes) are not entitled to a writ of peremptory mandamus compelling the city commissioner of public works to grant them a permit to cross the adjacent sidewalk with carts and trucks in order to fill the land. The right to a writ of mandamus is not an absolute one.

APPEAL by the relators, John Canavan and others, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 10th day of May, 1897, denying their motion for a peremptory writ of mandamus requiring the respondent to grant them a permit to cross the sidewalk of the east side of Edgecomb avenue with carts and trucks for the purpose of filling in the property at such place.

L. Laflin Kellogg, for the appellants.

George L. Sterling, for the respondent.

RUMSEY, J. :

The relators applied to the commissioner of public works for a permit to cross the sidewalk on the east side of Edgecomb avenue, 200 feet north of One Hundred and Forty-fifth street, with carts and trucks for the purpose of depositing earth upon the property at that place. This permit was refused by the commissioner, whereupon this motion was made for a mandamus to compel him to issue it, and the question presented by the appeal is whether the court at Special Term erred in refusing the mandamus. The motion having been made upon affidavits, can only be granted where the right depends solely upon questions of law (Code Civ. Proc. § 2070); and, if any disputed question of fact is presented, the court, therefore, must deny the motion. In this case the affidavits on the part of the relators were met by contrary affidavits produced by the respondent. Upon the examination of this question, the facts stated in these affidavits of the respondent must be accepted as stating the true facts upon which the application must be decided (*People ex rel. Lewis v. Brush*, 146 N. Y. 60); and the question, therefore, is, whether, assuming the facts to be as stated in the affidavits presented by the respondent, the relators show such a clear legal right to a mandamus that it ought to have been granted by the court.

It appears that the land upon which it is sought to deposit this earth is a portion of the property set aside by chapter 56 of the Laws of 1894 for a park, which was to be called Colonial Park. This statute described certain lands by metes and bounds, and declared them to be a public parkway for public use and public purposes, and it required the municipal authorities of the city of New York at once, in the manner described in the act, to condemn the property and have the value of it appraised. The statute provided a complete scheme for the condemnation of the property and the payment of the price which should be awarded to the owners, and it operated to condemn the land and appropriate it for public use. (*Matter of the Application of the Mayor*, 99 N. Y. 569, 580; *Matter of Dept. of Public Parks*, 53 Hun, 280.) From the time of the passage of the act, and certainly from the time when the lands therein were located by the filing of the map, they were fully appropriated and set apart for public use, and the duty of taking

proceedings to appraise their value arose, and, as was held in the cases last cited, the value was to be appraised as of the time when the land was taken by the passage of the act. The law gave to the municipal authorities of the city of New York no *locus penitentiæ* or right to discontinue the proceedings, but the statute made it obligatory upon them, not only to take the proceedings for condemnation, but to pursue those proceedings to a final report. The case is not one where it lay in the discretion of the commissioner of public works, or the department of public works, whether or not to take lands, or whether or not to continue proceedings, which had once been begun, for the condemnation of land; but the taking of this land was the act of the Legislature, and the absolute duty of having it appraised was imposed upon the city without any right or power to discontinue it. The rights of the parties, so far as the taking of the land is concerned, were fixed by the statute.

It appears by the affidavits presented by the commissioner that proceedings were taken under the statute for appraising the value of this land, and, so far as this particular piece of property is concerned, the testimony has all been taken; and that testimony was given as to the value of the land at the time of the taking, and in the condition in which it was at the time the act was passed. This fact is not disputed. The land is intended for a public park, and it appears from the affidavits that when it was appraised it was in its natural condition. The land proposed to be taken for this park was rough and rocky and unimproved, and to a very considerable extent covered with trees and bushes. In this condition it is easily adapted for a public park, and the improvements necessary for that purpose can conveniently and easily be made with reference to the natural condition of the ground. The affidavits of the respondent show that the filling in of this lot, as it is proposed to be done by the relators, will change its natural surface and destroy to some extent its adaptability for the purposes for which it was taken, and add greatly to the expense of such grading and improvements of the surface as may be necessary to bring the land into harmony with the remainder of the park, which is necessary in laying it out for that purpose.

It further appears by the affidavits that no structures have been erected upon the land, and nothing had been done upon it until after

the proceedings to condemn it, when some persons, whose names are not disclosed, began to dump earth upon it and to change its natural conditions, and that all this seriously diminished its usefulness for the purpose for which it was taken. It also appears that the land belongs to James B. and Mary Ann Powers. The relators have no title to it. The precise nature of the right which they claim has not been made to appear, because they have not produced before the court the contract which they allege they have for filling in the property. All that is known about it is that this contract is not given to them by both of the owners, but by James B. Powers only. This information we have from the affidavit of the relators, and it must be confessed that it is exceedingly meagre and not very satisfactory. On the part of the respondent it is alleged that no contract was presented by the relators to the commissioner of public works, or to his deputy, from which the nature of the relators' right could be ascertained. It is further alleged upon information and belief that the contract which the relators say they have for filling this lot for the owner is a mere permit or license given to them for a small sum of money, permitting them to dump upon this lot earth and rock excavated from other premises. While this affidavit is made upon information and belief, the affiant states the sources of his information; and we think the fact thus stated must be accepted as the correct interpretation of the contract, more particularly as the relators did not see fit to furnish to the court or present to the commissioner the contract itself, so that its precise nature could be ascertained.

We have, then, this condition of affairs: This property, being adapted for use as a public park, has been taken by the Legislature for that purpose; proceedings to appraise its value have been taken; the evidence has been given upon both sides upon the theory that the property should remain in its natural condition, and that it should not be made less available for the purposes for which it was intended than it was in its natural state. It is proposed now not to use this property for the ordinary purposes for which land may be used, but to make a substantial and serious change in its condition, the effect of which will add greatly to the expense of devoting it to the purposes for which it was taken. The condition of affairs is substantially the same as it would be if one, having made an execu-

tory contract for the sale of land to be paid for at a future time, reserving to himself the right of possession, had attempted to commit waste upon the land, either by digging out its natural surface or by filling it up so as to make it less useful for the purpose for which the purchaser intended to buy it. Such things as that, it is quite clear, would not be permitted by the courts, and while it is not necessary to say that the courts would, in a case of this kind, where property is taken *in invitum*, restrain the owner from committing waste upon his property, yet it certainly would not lend itself any more than it was required to do to assist the owner to do the act which practically works a fraud upon the person who is to pay for the property taken. The right to a writ of mandamus is not an absolute legal right by any means. (*People ex rel. McMackin v. The Board of Police*, 107 N. Y. 235.) It will be granted to prevent a failure of justice, but never to promote manifest injustice. It is a remedial process and may be issued to remedy a wrong, but not to promote one; to compel the discharge of a duty which ought to be performed, but not to compel the performance of an act which will work a public and private mischief, or to compel a compliance with the strict letter of the law in disregard of its spirit or in aid of a palpable fraud. (*People ex rel. Wood v. Assessors*, 137 N. Y. 201.) When the city pays for this property it does so for the property in its natural condition, well adapted for the purposes for which it is intended to be taken. If that condition is permitted to be seriously changed, and rocks, refuse and earth be piled upon the land which the city is compelled to remove, it is quite evident that the value will be seriously diminished, and the court is not called upon to lend itself to any proceeding which will work so palpable an injustice upon the taxpayers.

The order appealed from must be affirmed, with ten dollars costs and disbursements to the respondent.

PATTERSON, O'BRIEN and PARKER, JJ., concurred; VAN BRUNT, P. J., concurred in result.

Order affirmed, with ten dollars costs and disbursements.

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JULIUS BOWMAN, Appellant, v. JAMES McCLENAHAN, Respondent.

Auction sale — the employment of puffers avoids the sale.

A sale of real estate at public auction must be actually, what it is nominally, an offer by the owner to sell the property to the highest bidder without any qualification, unless the owner reserves to himself openly at the time of the sale the right to bid upon the property, or openly announces a price below which the property shall not be sold.

Where the owner secretly employs puffers to enhance the price, a sale of the property, under such circumstances, cannot be enforced by the owner.

APPEAL by the plaintiff, Julius Bowman, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 5th day of March, 1897, upon the decision of the court rendered after a trial at the New York Special Term.

Edward W. S. Johnston, for the appellant.

John Hardy, for the respondent.

RUMSEY, J. :

The action was brought for the specific performance of an alleged contract for the purchase of land made by the defendant. The property consists of a house and lot in West Forty-first street belonging to the plaintiff. On the 6th day of May, 1896, with other lands belonging to the plaintiff, it was put up to be sold at auction. There were three pieces of land in all, and the one in question was the last of the three to be sold. The first two were bid in for the plaintiff, but the fact that they were so bid in was not made public at the time of the sale. After those two pieces had been struck off, the third piece was put up for sale by the auctioneer. It was started at \$12,000 and was bid up to \$27,000, at which sum it was struck off to the defendant. How many bidders there were does not precisely appear, nor is it certain who made the last bid before the one at which it was struck off to the defendant. It does appear, however, without contradiction, that one of the sons of the plaintiff, who was present at the sale, bid for the plaintiff upon the property, and that he bid up at least as high as \$20,000. As to

whether he bid any higher there was a dispute. It was stated by some of the witnesses, and, among others, by the auctioneer, that the last bid before the one at which the property was struck off to the defendant was made by someone who represented the plaintiff, and in this the auctioneer was corroborated by the defendant, who identified the person making the last bid before the one at which the property was struck off as the son of the plaintiff. This son, however, testified that he did not bid over \$20,000. However the fact may be in that regard, it is not to be disputed that bids were made upon this property by which it was run up to a very substantial extent in behalf of the plaintiff, and that this was done privately and without notifying those present at the sale that puffers were to be employed or that anybody was to bid to represent the owner at the sale. The learned justice before whom this case was tried refused specific performance upon the ground, among others, that a puffer having been privately employed by the owner to bid upon the property in his behalf, it was a fraud upon real bidders, and that for that reason the purchaser would not be compelled to perform his contract. This presents the question whether it is allowable for the owner of property, who puts it up at auction, to employ privately, and without giving notice of the fact, persons to bid the property up in his behalf; and whether a bidder at such sale, to whom the property is struck off, will be permitted to refuse to perform his contract upon the sole ground that puffers have been employed. There is no doubt that it is competent for the owner of property who puts it up at auction to use some means to protect his interests and to see that his property is not sacrificed. It is conceded that he may do this either by fixing a price below which the property shall not be sold, and announcing that at the sale, or by publicly reserving to himself the right to make one or more bids if his interests shall require it. For the owner to protect his interests in this way, giving public notice of the fact that he has done so, certainly does not operate as a fraud upon anybody, for any one who begins to bid with the knowledge that these precautions have been taken upon the part of the owner, does so with notice of precisely what he has to meet. But that is a very different thing from giving private instructions to the auctioneer, or from privately procuring one to bid upon the sale in the interest of the owner, who is not to

buy the property if he should be the highest bidder. The essence of a sale at auction is that the property offered shall go to the highest real bidder. Whenever it is put up that act constitutes an offer on the part of the owner, through the auctioneer as his agent, to sell to the person who shall bid the highest price for it, and every bid constitutes an offer on the part of the would-be purchaser to take it at the amount of the bid if it shall be struck off to him at that sum. It is well known that bidders at auction sales are influenced to a considerable extent by the number of other bidders, the amounts offered by them and the apparent anxiety they show to become the owners of the property; and if these conditions are affected by a private arrangement between the auctioneer and the owner, as the result of which persons who were not in reality intending to buy are allowed to appear as genuine competitors, it holds out to those who are real bidders false inducements, and makes false representations to them as to the desirability of the property and the demand for it, which in fact operate as a fraud upon them. For this reason it would seem, upon principle, that the private employment of a puffer by an owner at an auction sale rendered the sale void, and relieved the person to whom the property was struck off from the necessity of performing his contract.

Upon authority this question is not entirely free from doubt, although the preponderance, both of the cases and of the text writers, is in favor of the conclusion reached by the court below. In England for many years the courts of common law and of equity were irreconcilably opposed upon this question. It was held by the courts of common law that the employment of a puffer or by-bidder at an auction sale rendered the sale void, so that the person to whom the property was struck off could not be compelled to perform his contract. The rule was laid down first by Lord MANSFIELD in the case of *Bexwell v. Christie* (Cowp. 395), and his judgment in that regard was followed consistently by the courts of common law until the matter was settled by act of Parliament. Strangely enough the courts of chancery in England adopted another and less stringent rule. It was held by these courts under the lead of Lord LOUGHBOROUGH, in the case of *Conolly v. Parsons* (3 Ves. Jr. 625, n. 1) that the mere employment of a puffer for the purpose solely of protecting the interest of the owner and not for the purpose of inprop-

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erly enhancing the price was legitimate, and would not avoid the sale, although it was done privately and without notice of the fact being announced. This rule of the Court of Chancery was followed in that court with more or less hesitation, and the question there remained in dispute until 1867, when it was settled by act of Parliament, reciting the conflict in the courts of law and equity in regard to the question, and providing substantially that whenever a sale by auction would be invalid by reason of the employment of a puffer, the same should be deemed invalid in equity as well as in law: This statute settled the law of England upon that subject, after a conflict of over a hundred years. In this country, while the courts are not unanimous, yet the great weight of authority is in favor of the doctrine announced in the court below. The leading case upon the subject, and one which should be deemed to be conclusive, is the case of *Veazie v. Williams* (8 How. [U. S.] 134) in the Supreme Court of the United States. That was an action brought in equity to rescind a sale at auction for the reason that the purchaser had been defrauded by the employment of a puffer at the sale and thereby induced to bid much more than the value of the property. The serious question in the case was whether the employment of a puffer invalidated the sale, or entitled the purchaser to relief by having refunded to him the amount of his bid above the value of the property. The case was heard in the first circuit, before Judges STORY and WARE, and is reported in 3 Story's Circuit Court Reports, at page 611. There was a difference of opinion between the justices in that court, Judge STORY inclining to the opinion that the rule of law was that, although puffers were privately employed by the owner, yet if there were real bidders as well as sham bidders, and the last bid before the one at which the property was struck off was made by a real bidder, the purchaser was not entitled to relief and the sale was valid. Judge WARE, the district judge, dissented strongly from this view of the case, and by reason of the disagreement of the judges at the Circuit Court, the case came to the Supreme Court of the United States. It will be seen that the case was squarely presented, and the Supreme Court had before it for consideration both views of the law as held by the courts of England. The case was ably argued by the learned counsel and it received so much consideration that the judges of

the Supreme Court themselves were not able to agree upon a judgment. The majority of the court, however, held that the employment of a puffer operated as a fraud upon the real bidders, and that the plaintiff was entitled to be relieved by a repayment to him of the amount of the money which he had bid over the highest real bid. In that case the highest real bid was \$20,000, and the property was struck off to the plaintiff at \$40,000, and the owner was compelled to refund to him the difference between the two bids. In view of the circumstances in which this case was presented to the court, it is an authority of great weight and ought to be regarded as settling the question in this country.

In many of the States the same rule has been adopted. In the State of Pennsylvania there was some fluctuation in the cases, the Supreme Court at first holding that the employment of a puffer did not invalidate the sale if it was done solely with the intent of protecting the interest of the owner. (*Steele v. Ellmaker*, 11 S. & R. 86.) This case, however, was subsequently overruled, and it was held by the Supreme Court of that State that the employment even of a single puffer vitiates the sale (*Pennock's Appeal*, 14 Penn. St. 446; *Staines v. Shore*, 16 id. 200), and that must be now regarded as the settled law of that State.

The following cases may also be cited as establishing the same rule: *Towle v. Leavitt* (23 N. H. 360); *National Bank v. Sprague* (20 N. J. Eq. 159); *Baham v. Bach* (13 La. 287); *Smith v. Greenlee* (2 Dev. 126); *Moncrieff v. Goldsborough* (4 H. & McH. 281); *Curtis v. Aspinwall* (114 Mass. 187); *Hartwell v. Gurney* (16 R. I. 78); *Peck v. List* (23 W. Va. 338). In the two cases last cited the authorities are fully collated and the result seems to be that the rule stated above is thoroughly established by a great preponderance of authority in this country. The cases upon the subject are collected in the 3d volume of the American and English Encyclopædia of Law, 2d edition, at page 504, *et seq.*

The opinion of the text writers seems to agree with the majority of the authorities. Kent, in his Commentaries (Vol. 2, p. *537), while stating that the result of the authorities, perhaps, does not sustain the rule laid down by Lord MANSFIELD, gives as his own opinion that it is the more just and salutary doctrine. In sound policy, he says, no person ought in any case to be employed secretly to bid

for the owner against a *bona fide* bidder at a public auction. It is a fraud in law on the very face of the transaction, and the owner's interference and right to bid, in order to be admissible, ought to be intimated in the conditions of the sale (p. *539). In Story on Sales (at § 482) it is suggested that the more stringent rule of Lord MANSFIELD is the proper one to apply, and that, I think, is the conclusion of Sugden in his work on Vendors (Chap. 1, § 2), although he intimates that the English authorities are the other way, and that the weight of them is in favor of the chancery rule. Judge STORY, in his work on Equity Jurisprudence (§ 293), and Pomeroy, in his work upon the same subject (§ 934), seem to indicate their preference for the more stringent rule. In this State there is no authoritative decision upon the subject. In the case of *Hazul v. Dunham* (1 Hall, 655), Recorder JAY, sitting in the Mayor's Court of New York, discusses the question, but it was not presented in that case, and the case itself is not authority. The question was presented in the case of *Fish v. Hersey* (17 Hun, 370), and the General Term of the fourth department held that, it appearing that the plaintiffs were induced by the action of the puffer to bid a higher price than they otherwise would have given, they were entitled to have the sale set aside absolutely. The general question was not discussed, and the court did not attempt to investigate the full extent of the doctrine. The limited doctrine announced in that case was more than enough upon the facts of the case to warrant the setting aside of the sale.

Upon a consideration of all the authorities and the text writers, we are of the opinion that the only safe rule is the one announced by Lord MANSFIELD. It is essential in sales of this kind that there should be the utmost good faith, and the employment by the owner of underhand means to enhance the apparent value of his property is not warranted by any principle of sound morality. When it appears that any such steps have been taken by him it is not necessary for the person insisting upon the invalidity of the sale to show that any harm resulted to him from the improper act. If the fact that no harm resulted is material at all, and we cannot see how it is so, the burden of proving it should be upon the person who has employed the puffers to bid up the price of his property. But the sounder rule, as we think, and the only safe rule to be applied in

this transaction, is that a sale at auction must be actually in all cases what it is nominally, an offer by the owner to sell the property to the highest bidder, without any qualification, unless he shall reserve to himself openly at the time of the sale the right to bid upon the property, or shall openly announce a price below which the property shall not be sold.

For the reason that puffers were employed upon this sale we affirm the judgment, without passing upon the other questions decided by the court below or presented by the respondent in his points.

The judgment must be affirmed, with costs to the respondent.

VAN BRUNT, P. J., PATTERSON, O'BRIEN and PARKER, JJ., concurred.

Judgment affirmed, with costs.

ELISHA H. PRATT, as Administrator with the Will Annexed of WILLIAM C. HERRING, Deceased, Respondent, v. THE ROMAN CATHOLIC ORPHAN ASYLUM in the City of Albany and Others, Appellants.

A bequest to an unincorporated association is void — presumption as to the law of a foreign country — a bequest to the poor of a church is invalid — the Statute of Limitations is a defense at law — it will not be considered in an action to construe a will — surrogate to determine as to the payment of legacies.

A voluntary unincorporated association cannot take a bequest, even for charitable purposes.

In the absence of proof as to the law of a foreign country, the courts of the State of New York will either indulge in no presumption at all or will assume that the foreign law is the same as that of the State of New York.

A bequest to the poor of an incorporated church is invalid because of indefiniteness, even though the church be competent to take.

The proper place for an administrator to obtain a decree for the payment of legacies, when the question is presented as to whether they are barred by the Statute of Limitations, is in the Surrogate's Court, and unless some special reason exists for its so doing, the Supreme Court will not assume jurisdiction of the matter.

The duty of an administrator to plead the statute as against a legatee discussed.

Seemle, that, as the Statute of Limitations is a perfect defense to an action at law, equity will not consider the question in an action brought by an executor to obtain a construction upon the will of his testator.

APPEAL by the defendants, The Roman Catholic Orphan Asylum in the city of Albany and others, from a judgment of the Supreme Court, entered in the office of the clerk of the county of New York on the 20th day of March, 1895, upon the decision of the court rendered after a trial at the New York Special Term.

Edward J. McGean, for the appellants.

T. F. Huskell, for the respondent.

ROMSEY, J. :

The action was brought for the construction of the will of William C. Herring, deceased, by which bequests were made for charitable purposes to certain organizations, some incorporated and some unincorporated. Several of the bequests were held good at the Special Term, and as to those no question is raised upon this appeal. Those of the appellants whose bequests were held to be invalid dispute the correctness of the judgment so far as it refuses to recognize as valid the bequests to them respectively; and all of the appellants attack it because it does not adjudge the payment of their legacies and determine that the Statute of Limitations has not run against them.

By the 7th clause of the will the testator bequeathed "to the Poor Schools attached to the St. Patrick's Church, Soho, England, said schools are now situated in Tudor Place, \$3,000." This bequest was held by the Special Term to be void because it did not appear that the legatee was an incorporated association. The answer of the legatee asserted that by the law of England an unincorporated association could take for charitable purposes. An effort was made to prove that such was the law, but the effort was entirely unsuccessful. All the proof offered on that point consisted of a letter to that effect, and a declaration made under the laws of Great Britain and Ireland providing for the taking of proof to be used in the colonies of that nation. This proof was excluded, and rightly. The letter, of course, in no case could have been proof of anything. The

declaration offered, while it might possibly have been admitted as evidence in the courts of any of the colonies of Great Britain, did not comply in any respects with the statutes of this State so as to permit it to be read in evidence. No other proof was offered on the subject. Whenever the question is presented as to what is the law of a foreign country in any given case, it must be established as a fact; and if there is no evidence given upon the question, the court will either make no presumption at all, or will presume that the foreign law is the same as the law of this State. In this State it is well settled that a voluntary unincorporated association has no legal capacity to receive a bequest, even for a purpose denominated charitable. (*Sherwood v. American Bible Society*, 1 Keyes, 561; *Owens v. The Missionary Society of the M. E. Church*, 14 N. Y. 380; *Downing v. Marshall*, 23 id. 366.) Upon the state of facts appearing in this case, the Special Term was clearly right in holding that the bequest to the poor schools attached to St. Patrick's Church was not valid.

By the 8th clause of his will the testator bequeathed to the Roman Catholic Aged Poor Society in the city of London, Eng., \$1,000. This bequest was held to be void, and was properly so held for the reason given in regard to the previous bequest.

By the 6th clause of his will the testator bequeathed to the poor of St. Peter's Roman Catholic Church in Barclay street, \$1,000. It was made to appear that the Roman Catholic church in Barclay street was an incorporated religious society, but this bequest was not made to that church, and that church had no right to receive it. The beneficiaries under the bequest, who were also the legatees, were the poor of the church. This bequest, held to be void at the Special Term, was correctly so held, not only because of the reasons stated in the previous part of this opinion, but for the further reason that, even if there had been a trustee competent to take a bequest to the poor of a particular society or place, it must be held void for indefiniteness. (*Fosdick v. Town of Hempstead*, 125 N. Y. 581.)

The other bequests in the will were held to be valid, and from that portion of the judgment no appeal is taken.

Besides asking for a construction of the will as to the various legacies, the plaintiff asked in his complaint a general instruction as to whether the legacies were, at the time of bringing the action, valid

claims against the estate. He insisted upon the trial that the Statute of Limitations had run in his favor against all legacies, whether otherwise valid or not, and, therefore, the judgment should direct that none of the legacies were to be paid, but that the estate should be distributed among the next of kin. This instruction the court below refused to give, holding that the Statute of Limitations could only be used as a defense in case actions were brought by any of the legatees for their legacies. The plaintiff did not appeal from this judgment, and, for that reason, he is not in a position to question the correctness of it, but is bound by it.

The Roman Catholic Orphan Asylum of the city of Albany, however, did except to that portion of the decision, and comes here now insisting that the court should instruct the administrator that the Statute of Limitations has not run against these legacies, but that they should be paid in accordance with the directions of the will. It is unnecessary, in examining the question as to the correctness of this portion of the judgment, to consider the facts which have been made to appear in the case. It is simply sufficient to say that the Statute of Limitations, if it applies in any case, is a perfectly good defense to any action brought to recover a claim upon a legacy against which it has run, and it may be set up whenever that claim is sought to be made, at any time or in any court. (*Matter of Rogers*, 153 N. Y. 316, 322.) If it is not pleaded the court cannot take any cognizance of it, or make any ruling in regard to it. (Code Civ. Proc. § 613.) Whether, in an action brought upon these legacies, it would be the duty of the administrator to plead the Statute of Limitations may be very doubtful. The reasons which have induced the courts to say that it is the duty of the administrator to plead the Statute of Limitations in every action brought against him for the debt of a testator do not apply to an action for a legacy, which can only be brought because of his failure, for some reason, to carry out the intention of the testator as expressed in the will. It is hardly to be supposed that the courts would insist that it was the duty of the administrator, with the will annexed, to plead the Statute of Limitations to a legacy which, without fault of the legatee, had never been paid. If the case were one in which the statute might properly be pleaded, and, when pleaded, would be a defense, then it would be a perfect defense; and it is the rule of law that where one

has a perfect defense to a claim which may be made against him in an action at law, he will not be permitted to bring an action in equity to restrain the prosecution of the legal action, but must stand upon his legal defense when the action at law shall be brought against him. (*Bomeisler v. Forster*, 10 App. Div. 43.)

The proper place to obtain a decree for the payment of legacies given by will is the Surrogate's Court, and in the absence of a special reason why it should do so, this court will not assume to undertake the judicial settlement of the estate and give directions as to the payment of debts or legacies. No reason is seen why the plaintiff should not proceed in the Surrogate's Court to settle the estate, and upon that settlement receive such instructions as to the payment of the legacies as should necessarily be given upon a consideration of all the facts and of the provisions of the will as construed by this judgment.

The judgment appealed from must be affirmed, with costs to be paid by the appellants to the respondent.

VAN BRUNT, P. J., PATTERSON, O'BRIEN and PARKER, JJ., concurred.

Judgment affirmed, with costs to be paid by the appellants to the respondent.

In the Matter of the Application of THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK for the Appointment of Commissioners.

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Respondent; CATHERINE F. RYER and Others, Appellants.

Eminent domain — reference in a statute to a map — attaching additional sheets to a map after it has been filed — 1892, chap. 114.

Where a statute definitely refers to a map by its date and the date of its filing in a public office, the fact that the statute incorrectly designates the commissioners by whom the map was made is of no importance.

Where two sheets, purporting to contain corrections of clerical errors in a map, are inserted in it, after filing and without the authority of, and unsigned by, the commissioners by whom the map was made, the new sheets are not a part of the map.

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APPEAL by Catherine F. Ryer and others, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 16th day of September, 1895, confirming the report of the commissioners of appraisal in relation to the assessinents for regulating and grading or otherwise improving the Fort Washington Ridge road.

George S. Coleman, for the appellants.

T. C. O'Sullivan, for the respondent.

James A. Deering, for the New York Institution for the Deaf and Dumb and other owners, respondents.

RUMSEY, J. :

A statute passed in 1865 made provision for the laying out and improvement of certain portions of the city of New York. Pursuant to that statute there was laid out in the upper part of the island, commencing at the junction of One Hundred and Fifty-ninth street and Eleventh avenue, a road known as the Fort Washington Ridge road, which extended northerly by various courses and distances until it ran into the Kingsbridge road at a point somewhat above One Hundred and Ninety-eighth street. The map of this road as it was proposed to be constructed was certified and dated the 18th day of February, 1873, and was filed in the office of the register on the seventh day of April of that same year. Proceedings were taken for the condemnation of land and for the estimate and appraisal of damages and benefits, and on the 26th of April, 1876, the damage and benefit maps were filed. After that had been done the work of opening and grading was begun. Up to that time it appears that, although the road had been laid out upon paper and the courses and distances had been stated upon the map, it had not actually been located upon the ground, which, it seems, was not thoroughly done until shortly before the work of opening and grading had been begun. While the original map of the location of the road filed in 1873 had purported to give courses and distances and the width of the road between the lines and its general direction, it appears that through some defect or

incorrectness in the map it was not practicable to lay out accurately upon the ground the road as it was designated upon the map. Whatever may have been the reason, it appears that, after the road had been partly completed, it was ascertained that the road as built did not agree either in courses or in location with the road as originally projected and as drawn upon the maps, and serious doubts arose whether it was proper to continue the construction of the road until the work which had been done before that time had been legalized by the Legislature so that lawful assessments could be made for the expense of the work. For the purpose of settling all doubts upon the question of the legality of the construction of the road, the Legislature, on the 9th of March, 1892, passed chapter 114 of the Laws of 1892, which is the act under which the proceeding now before the court is taken. That act provided "for settling and establishing permanently the location and boundaries of the avenue known as Fort Washington Ridge Road in the city of New York, and in relation to the improvement thereof." It provided in the first place for the appointment of three commissioners who should at once adjust, determine and establish the lines of the road so that it should accord and agree as nearly as possible with the road as laid out or intended to be laid out by the map of February 18, 1873, but power was given to the commissioners to alter and change the lines and grade of the road in order to avoid any substantial change in the lines and grade as laid out. The commissioners were required to make two maps showing the width, course, direction, curves and grades of the road as they should establish it, which maps were also required to show the location, as nearly as possible, of the road as laid out or originally intended to be laid out. It was then established substantially that the maps so filed should be final and conclusive in respect to the road as established by them; that the lines established upon the maps should be the permanent boundaries of the road, and all parts of the road before that time laid out, and that all lands which were not included within the lines as established by the commissioners should cease to be public streets or roads of the city; and it was further provided that all lands included within the lines as laid out by the commissioners which had not already been taken, should, upon compliance with certain other provisions, become public lands and a portion of said road. For the

purpose of appraising the cost of said road and the damages to be paid to lot owners whose lands should be taken, three commissioners of appraisal were appointed, whose duty it was, not only to fix the amount which had theretofore been paid for the laying out of the road and the amount which was necessary to complete it and assess that sum upon the adjacent lands, but also to appraise the value of the property which should be taken under the new location, and the value of the property which, having been taken under the old location, had ceased to belong to the city. These appraisers, having been appointed, met and assessed the amount to be paid for the completion of the road, and from the order confirming their report fixing that amount and assessing it upon the adjacent owners, this appeal is taken.

A very large majority of the lot owners were satisfied with the report of the commissioners of appraisal, and the appellants here represent only a small minority, in number and amount, of those assessed. Upon the hearing of the motion to confirm the report, as well as upon the hearing before the commissioners, the appellants here presented various objections, many of which seem to have been abandoned upon this appeal and will not be considered, only those being examined which are presented in the brief of counsel.

The first point made by the appellants is that the map filed by the mayor's commissioners in an attempt to comply with the provisions of chapter 114 of the Laws of 1892 does not conform with the requirements of that act. The first item of alleged non-conformance appears to be based upon the claim that the statute requires an impossibility for the reason that it requires the commissioners to construct their map as nearly as possible in accord and agreement with the lines, courses, boundaries, curves and direction of the road as laid out or intended to be laid out by the commissioners of Central Park; and the counsel say that, as the commissioners of Central Park went out of existence long before 1873 and the map dated 18th of February, 1873, had been laid out by the commissioners of the department of public parks, the mayor's commissioners appointed under the act of 1892 could not make a map to accord and agree with the map laid out by the commissioners of Central Park. It is hardly necessary to take time seriously to examine this contention. The map which was to be considered by the commissioners appointed

under the law of 1892 was clearly designated in that statute as the map dated 18th of February, 1873, and filed on the 7th of April, 1873, and whether that map was made by the commissioners of Central Park, or their successors, the commissioners of the department of public parks, is a matter of no sort of importance. It is sufficient if the map was so clearly designated that it could be easily ascertained.

It is also complained that the map made under the provisions of the law of 1892 does not comply with the statute because the statute required that the commissioners, in making the map, should, in addition to putting upon it the lines of the road as located by them, also show as nearly as possible the location, course and boundaries of the road as originally laid out or intended to be laid out, and also the appraisals of land whose titles had been acquired by the city, and that it does not show the location, courses and boundaries of the road as originally laid out. This objection is quite as frivolous as the other. It appears from the testimony that the lines upon the map of the road, as originally laid out, correspond almost precisely with the lines upon the map of the road as laid out by the mayor's commissioners under the law of 1892. The discrepancy between the road as built and the road as laid out by the mayor's commissioners arose, not because the lines were incorrect, but because the figures showing the radii of the curves and the length of the curves and tangents were so incorrectly put upon the map that, in the absence of monuments, which had not been placed upon the ground, it was impossible to locate correctly the lines of the original map, and, therefore, although the map may have been made correctly, errors occurred in the effort to lay out the road upon the ground in accordance with the original map. The only change in the road which was made to appear by the new map was one which was particularly located and designated. In other respects it was made to appear that the lines of the two maps corresponded, and for that reason it was impracticable to show any difference between those lines.

It is to be remembered that the trouble arose, not because the map, regarded as a picture of the road as it was intended to be, was incorrect, but because the road as laid out, in an effort to locate the lines upon the ground, did not correspond with the lines as they were put upon the map, and the discrepancy which exists is not between

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the lines of the two maps, but between the map lines and the actual lines as they are upon the ground. Mr. Haskins, who made the map, states that his map does show the location, course and boundaries of the road as originally intended to be laid out, and that the reason that there is no difference between those locations and the locations as made by the mayor's commissioners is that the same lines were adopted as the correct lines of the road.

The third objection is that the map had been altered since it was filed. The alleged alteration consisted in inserting in the map, after its filing, two sheets purporting to contain corrections of clerical errors. These were inserted without any authority of the commissioners and were not certified by them, and, therefore, if they contain any changes of the map as originally certified, they cannot be regarded as a part of the map and are not important.

It is contended by the appellants that this map is erroneous, for the reason that it indicates that parcels of property outside the road were acquired by the city in the proceeding for opening which was confirmed in 1876; and that appraisals of property within the limits of the road were not acquired in that proceeding. This contention is based upon the idea that the location of the road as shown upon the two maps is precisely the same, and that the road, as laid out upon the ground and partly completed, complies exactly with the road as located upon the map. It appears fully by the papers that this is not the case, but that, as has already been said, the road was not laid out upon the ground as it was intended to be located, and that, because of the failure to lay it out properly, many parcels of land which were intended to be taken, and which would have been taken had the road been laid out as it should have been, were not within the boundaries of the road as it was opened, and that many parcels of land which were within the boundaries of the road as it was actually opened were not within its boundaries as located upon the map. These facts lay at the basis of the law of 1892. They are fully established by the evidence, and as to them there can be no possible question. It is a matter of no importance what was the reason of this discrepancy. It may have been because the figures put upon the original map were not correct, and did not describe accurately the curves and tangents of the map as laid out upon the

paper. It may have been because the map, although correct, was not properly followed in laying out the road upon the ground. Whatever may have been the reason, the fact undoubtedly was that a serious discrepancy existed, and it is idle to take the time of the court and waste the money of the city in an effort to establish the fact that the road as laid out upon the ground did not contain within its boundaries many parcels of land which were not intended to be taken when the map was made by which it was originally located.

It is also objected that the assessment maps made by the commissioners of appraisal repeat the errors of the map made by the mayor's commissioners upon which they are founded, and for that reason are defective and erroneous; and, therefore, the report based upon them ought not to be confirmed. The evidence does not show that any of these maps are either defective or erroneous, but the contrary. A reading of all the testimony leaves upon the mind a clear impression that, whatever may have been the reason, the only correct maps of this road, laying it out upon the ground as it was intended to be located, are those made by the mayor's commissioners and by the commissioners of appraisal.

No other objections are urged here for the reversal of this order, but, nevertheless, we have examined the other objections which are shown in the record. We agree with the court below that none of them are well taken, and that in despite of them the order confirming the report should be affirmed, with ten dollars costs and the printing disbursements to be paid by the appellants.

VAN BRUNT, P. J., O'BRIEN and PARKER, JJ.. concurred.

Order affirmed, with ten dollars costs and disbursements.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. ISAAC
ZUCKER, Appellant.

Arson — facts not constituting one an accomplice as matter of law — necessity of a criminal intent, which must be found as a matter of fact — proof of a fire in a neighboring city, which was a part of the same plot, is admissible in corroboration of the testimony of an accomplice.

A person not connected with nor concerned in the commission of the crime of arson in the first degree, and who, according to his own testimony, positively declined to assist in it, is not made an accomplice as matter of law by the mere fact that, at the request of the accused shortly before the crime was committed, he removed some plaster from a wall in a room of the building subsequently burned, through which wall the accused intended that the fire should spread, and had, at the time, without disclosing it, knowledge of the principal's guilty intention. Such a person is not incompetent to testify in corroboration of a confessed accomplice, as, in order to make an act criminal, the actor must perform it with an intention that it shall aid in the commission of the crime.

Seemle, that when a question exists whether an act was done with such an intent, it should be submitted to the jury and must be by them answered in the affirmative before the actor can be held to have been an accomplice.

Proof that, prior to the fire charged in the indictment, which occurred in a house in the city of New York, insured by the accused in his own name, he concocted and subsequently carried out a scheme to burn, at about the same time, in a house which he owned in Newark, N. J., and had insured in the name of another person, personal property removed from the New York house to the house in Newark, N. J., to the end that it might be there destroyed by an incendiary fire, coupled with proof that the same accomplice was concerned in both fires, and that both fires were planned by the accused to secure the insurance moneys, is competent upon the trial of the indictment for the fire in New York, as the two fires are so inseparably related in plan and execution that they may be regarded as a single transaction having two branches.

INGRAHAM and WILLIAMS, JJ., dissented.

APPEAL by the defendant, Isaac Zucker, from a judgment of the Supreme Court in favor of the plaintiff, rendered on the 29th day of December, 1896, convicting him of the crime of arson in the first degree.

William F. Howe, for the appellant.

John D. Lindsay, for the respondent.

PATTERSON, J.:

The appellant was convicted of the crime for which he was indicted and tried upon the testimony of the witness Schoenholz,

who swore that he set fire to the premises in Division street, and that he was employed by Zucker to do so. One question arising in the case is, as to corroboration of the statements of this witness Schoenholz, such corroboration being necessary in order that the proof of the defendant's guilt should not rest altogether on the unsupported testimony of an accomplice in the transaction. The record contains corroborating evidence, and it is to be found in the testimony of the witness Meyers, who swore to a conversation between himself and Zucker, the prisoner, which conversation took place at about the exact time the fire occurred, and in which Zucker declared to Meyers that he had been waiting for an hour; that he did not hear any fire engines coming, and was worried about it and asked Meyers to go over to Division street and tell Schoenholz to give him the key; "I want to make that to-night; I am afraid it won't go off and they are liable to find that stuff all in there." Meyers says he declined going because an explosion was likely to take place, and that, he being seen about there, people in the neighborhood would be apt to think that he, Meyers, had something to do with it. Meyers then walked, according to his story, with the prisoner up Grand street as far as Attorney street, when the fire engines were seen coming, whereupon the prisoner said, "Meyers, it's all right; it is off; I am sure they won't find the stuff there now." Subsequently, and while the fire was in progress, the prisoner remarked that it was not much of a fire; he did not think Schoenholz did it right; that there were two streams on it and it looked to be more smoke than it was fire. It is claimed that this evidence is subject to the same criticism as that made of Schoenholz's, namely, that Meyers also was an accomplice. I do not think that Meyers can be regarded as standing in that relation to Zucker. He was not *particeps criminis*; he was in no way connected with the crime itself; he had nothing to do with its commission; was not concerned in it, but according to the testimony positively declined to take any part in it. His single act in helping to remove some plaster from a part of the wall of the Division street house did not necessarily make him an accomplice. All that is to be said concerning him is that he knew of the purpose of Zucker and did not reveal it.

Upon this state of facts the court was asked to charge substantially that Meyers was an accomplice, and for that reason his evidence could

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not be used to corroborate the evidence of another accomplice, and that it could not be regarded as sufficient to convict unless it was corroborated. This the court refused, and to this refusal, which is now relied upon as error, exception was taken.

To constitute an accomplice one must be so connected with a crime that at common law he might himself have been convicted either as the principal or as an accessory before the fact. To warrant such a conviction the one accused must have taken part in the perpetration of, or preparation for, the crime, with intent to assist in the crime. Every act which may have a tendency to assist in the perpetration of the crime is not, of absolute necessity, criminal. Before it will have that effect it must have been done with the *intention* on the part of the actor that it shall aid in the commission of the crime. Unless it appears without dispute that there was such intention, the person doing the act cannot be said to be a principal; and if there is a question whether the act was done with such intent, that question must be submitted to the jury and answered by them in the affirmative before the actor can be held to be a principal, and consequently before he can be held to be an accomplice.

The court was asked to charge that, as a matter of law, Meyers was an accomplice. This it properly refused to do. Giving to the facts sworn to the largest effect, all that can be said is that the jury, upon those facts, might have found that Meyers did the acts with intent to assist in preparations for the perpetration of that crime, and if that intent had been found he could be charged as an accomplice. But it was for the jury to find the intent. The court was not asked to submit to the jury the question whether he was an accomplice, or to say to the jury that, if they found that he did the acts with intent to assist in the perpetration of the crime, then he was an accomplice, and required corroboration. Had that request been made a different question would have been presented. But the court did not err in refusing to decide the effect of those facts as a matter of law, and for that reason it was not error to refuse to charge as requested.

But the important question in the case relates to the admission of testimony as to the perpetration by the appellant of the crime of arson, consisting of the burning by him, or at his instigation, of a building in Newark, in New Jersey, shortly before the fire occurred in Division street, in the city of New York. The New York fire

occurred on the 4th of January, 1892. A few days before that certain premises in Mulberry street, in the city of Newark, were burned, in which premises had been placed personal property removed from the Division street house to Newark by the procurement of Zucker. The testimony, with respect to the Newark fire, came into the case on the examination of Schoenholz, and, at first, without objection. but at a subsequent stage of the case was objected to and was admitted under exception. It is quite apparent that evidence, touching this Newark fire, must have been very influential, and, if it were improperly allowed to go before the jury, there can be no doubt that the conviction should be reversed. The ground of the appellant's attack upon it is, that it relates altogether to an independent crime for which the prisoner was not indicted, and which was in no way connected with the alleged offense for which he was being tried. The rule is wide in its application, that evidence of independent and disconnected crimes cannot be given on the trial of an indictment for a specific offense. The justice and reasonableness of the rule is too apparent to need comment. But where one crime is committed to prepare the way for another, and the commission of the second crime is made to depend upon the perpetration of the first, the two become connected and related transactions, and proof of the commission of the first offense becomes relevant to show the motive for the perpetration of the second. It would scarcely be doubted that, on the trial of an indictment for murder, it might be shown that the prisoner, in order to furnish himself with a weapon with which to do the killing, stole that weapon, and the larceny thus becomes part of the preparation for the murder. In the case at bar the question is, whether the act of arson committed in Newark was part of a scheme to prepare the way for the burning of the house in Division street in New York, proof of it furnishing evidence either of a motive for the commission of the crime in New York, or showing a set of circumstances designed and brought about to divert suspicion as to the origin of the crime the prisoner contemplated committing in burning the house in New York. If the commission of the so-called independent crime is traced in the evidence as directly connected with the act of burning the New York house, to show a motive and a reason for that burning, the two acts become part of one con-

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nected scheme culminating in the arson for which the prisoner was indicted.

Without stopping to comment upon the contaminated source of the testimony on this topic (for all that was properly and very carefully dealt with by the trial judge), it was shown that Zucker's scheme was concocted as far back as the month of August, 1891. He then occupied the premises 264 Division street, and was the owner both of the house and of certain furniture situated therein. At that time Zucker, at the house of one Blum, employed Schoenholz to remove the furniture from 264 Division street to 140 Mulberry street, in Newark. He told Schoenholz that he wanted to have the furniture moved, because he was going to burn down the Division street house, as it was condemned by the board of health, and it would cost about \$2,000 to fix it up. In substance, he wanted the furniture moved to Newark, where he would have it insured in the name of one Seltzer, for the reason that he (Zucker) could not get it insured in his own name, because he was blacklisted by the insurance companies. The evident purpose of this removal of the furniture was to have it insured and then destroyed by an incendiary fire in Newark, for Schoenholz asked Zucker, "What will you do to him (Seltzer) if he will beat you out of it?" There can be no misunderstanding of the testimony as to what this inquiry relates, for after the furniture was moved Zucker declared to Schoenholz, "I think I will arrange it so that these two places will go off at the same time, Newark and here." Zucker also declared that he left certain of the personal property in the Division street house, namely, remnants of goods, and machinery and sewing machines, "for the purpose, when the house shall burn down, the insurance company will have no suspicion that the place was set on fire, because there will be so much goods laying around, and it will be such an accident fire, and I was not insured," meaning on that remaining property. Now, it is perfectly obvious from this testimony, and the jury believed it, that Zucker, intending to destroy the house in Division street, and also the personal property belonging to him situated in it, prepared a scheme by which the personal property should be destroyed by an incendiary fire in Newark, and the house destroyed by an incendiary fire in New York, both fires to occur at about the same time, and in the preparation for both of which intended simultaneous fires Zucker

employed the witness Schoenholz. Zucker's object was to get the insurance on the personal property, then in the Division street house, through a transfer of it to Seltzer, its removal to Newark, and its destruction by fire under circumstances with which he would have no apparent connection. Such being the scheme, the one plan that Zucker concocted for the purpose of burning his house and his personal property then in that house, the prosecution merely undertook to show that that scheme was carried out, and that the crime of arson was committed in precisely the way in which it was intended and prepared, the only difference being that, instead of the two fires occurring on the same day, one preceded the other by a few days. That Zucker caused the whole scheme to be executed in both its parts was testified to. Schoenholz said: "So you had a fire there already in Newark, and you kept your word; you were going to let me do it." To which Zucker replied: "You could not have done it any how, and the best luck that I ever had happened to me at this fire." Here was a positive acknowledgment by Zucker of the consummation of that branch of the scheme which involved the burning of the personal property which had been removed from the Division street house in order that it might be destroyed in Newark to obtain the insurance money; and the proof of the destruction of the building in New York, for the purpose of procuring insurance money, was also proven.

These two fires stand so closely and inseparably related in the formation and carrying out of one plan for destroying both classes of property for the purpose of getting insurance on both, that I think no fair doubt can be entertained as to the competency and admissibility of the evidence relating to the one transaction in its entirety, of which may it be said only that it included two branches.

The conviction was right and should be affirmed.

RUMSEY and PARKER, JJ., concurred; WILLIAMS and INGRAHAM, JJ., dissented.

INGRAHAM, J. (dissenting):

The defendant was indicted with one John Blum for setting fire to and burning a dwelling house, No. 264 Division street, and upon the trial on this indictment the defendant was convicted of arson in the first degree. There is one exception in the record which I

think is fatal. The principal witness against the defendant was one Schoenholz, an accomplice, who testified that he lighted the fire at 264 Division street at the instigation of the defendant. The first talk he had with the defendant on the subject was in August, 1891. At that time the witness moved the defendant's furniture from Division street, and the defendant then told the witness that, right after the Jewish holidays, he was to have another job to move his store to Newark; that Zucker said: "I got to burn down this shanty; otherwise the Board of Health will condemn it, and if I should go to fix it up, it will cost about \$2,000, and I will give the company a chance to fix it up for me." Blum, who was the owner of an adjoining house, entered into the arrangement by which both houses were to be burned or damaged by fire or water. The defendant also said that he had got a store in Newark in the name of one Seltzer, saying that he could have it insured in Seltzer's name. After the Jewish holidays in October, the witness saw the defendant again, and the defendant said: I am going to move the store now to Newark; I have got a store already. First thing you will move me is the fixtures, boards and other things that belongs to the fixtures." The next day the witness again saw the defendant, and Seltzer and the witness moved some boards and a case of goods from the cellar, and some clothing and other articles, and took them to Newark. Seltzer went with the witness on the wagon, and when they got to Newark, Zucker, the defendant, was there. The next day the witness carted a big truck of clothing from the same place to Newark from 264 Division street, and another load on the following day, three loads altogether. These goods were mostly clothes bundled up, but inside of the bundles some of them were burned over the edges. Subsequently, the witness had another interview with the defendant at the Division street house, at which he said: "Now, I am going to prepare this place to burn it down, and I will see what kind of an engineer you will make." The defendant then detailed the plan by which the fire was to be started, and ended up by saying: "Right after the fire in Newark I am going to prepare this." The witness testified to a subsequent conversation with the defendant in the latter part of December, at which the witness said: "So you had a fire there

already in Newark. You kept your word. You were going to let me have it, to let me do it," and the defendant said: "You could not have done it anyhow, and the best luck that I ever had happened to me at this fire." The witness then described how the defendant stated that he started the fire in Newark, and who also said: "Now, we are going to prepare this, to burn down this shanty." On January fourth the witness was again at the house in Division street with the defendant, when, as he testifies, the preparation for the fire was made. The partitions between Zucker's house and Blum's house were broken down; twenty gallons of benzine were procured, and the defendant took the benzine and poured it into tubs or barrels, directed the witness to sprinkle some of the benzine upon the stairs and curtains, and then the defendant left the house, leaving the witness in charge. Subsequently the defendant returned and sprinkled the benzine all over the woodwork and on the wall between his house and Blum's house, and wetted the curtains and the staircase with it; and, finally, when the arrangements were completed, the defendant told the witness that he would give him twenty-five dollars to light the candle. The defendant then went away, leaving the witness in the house. Sometime after the witness lighted the candle he went to the corner of Montgomery and Division streets, in a liquor store, waited there until the fire broke out and until it was extinguished.

We have here the testimony of the participation by the defendant in the burning of the Division street house, the crime for which he was indicted and convicted. If this testimony is true, the crime with which the defendant is charged is proved. This witness, however, being an accomplice, the jury were not justified in convicting unless his testimony was corroborated. For the purpose of such corroboration, the district attorney called one John Heath, who resided in Newark, and others, who were, against the objection and exception of the defendant, allowed to testify to facts tending to show that the defendant had set fire to the Newark house. The district attorney was, therefore, allowed to prove the commission by the defendant of the crime of arson in Newark upon an indictment charging a commission by the defendant of the crime of arson in New York. There was no immediate connection between the two crimes. According to the testimony of the conversations of the

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defendant, the Newark fire was started by the defendant himself, while the New York fire was started by an accomplice in the absence of the defendant. No immediate connection between the burning of the two buildings is shown, and nothing is shown to make the two fires a part of the one conspiracy or one crime. They seem to have been as much independent crimes as the murder at different times of two people, one of whom was killed in Newark and the other in New York. No intention is disclosed of making one fire for the purpose of drawing suspicion from the defendant as to the other. There is no direct connection between them, except the fact that the defendant had stated to the witness that he intended to burn both buildings. When the district attorney offered evidence to show that the defendant was guilty of the crime in Newark, the learned court held that the evidence was only competent as tending to corroborate the accomplice, and it was admitted for that purpose. It will be noted, however, that the accomplice had not testified that the defendant had committed the crime in Newark, but merely testified to conversations in which the defendant expressed an intention to commit the crime and subsequent statement that he had committed the crime. In overruling the objection of the defendant the court said: "The testimony upon the part of this witness is offered for the purpose of showing Zucker's presence there (at the Newark store); that there was a clothing store opened about two months previous to this Christmas, and that a fire did occur, Schoenholz having testified that Zucker told him that that fire had occurred in the manner which they had intended and provided for. This is, therefore, to that extent corroborative. What weight is to be given to it, of course, is for the jury, but the competency of the evidence, I think, cannot be doubted." I think that this evidence as to the Newark fire was entirely incompetent upon the trial of an indictment for setting fire to a house in New York, and it is quite clear that it was error which was essentially injurious to the defendant. The jury were not authorized to convict upon the testimony of this accomplice, unless it was corroborated; but the corroborative evidence must be such as to show the commission of the crime for which the defendant is indicted, or to connect the defendant with it. It is not permissible for the accomplice to testify to the commission of a crime entirely

independent of that for which the defendant was indicted, and then prove the commission of such independent crime to corroborate the accomplice. The testimony of the conversation between Zucker and this accomplice as to the Newark fire was not objected to, and probably was competent as a part of the conversation between the witness and defendant, at which the commission of the crime for which the defendant was on trial was arranged for; but proof that the other crime referred to in the conversation was actually committed is incompetent as evidence to show that the crime charged in the indictment was committed. How does it tend to show that the defendant was guilty of setting this house in Division street on fire, to prove that he was guilty of setting a Newark house on fire, except so far as it makes it probable that a man who had committed a similar crime before would commit the crime for which he was indicted? Such evidence has always been held incompetent. We think this rule was violated in this case when the People were allowed to prove, as evidence of guilt of the defendant upon this indictment, or as evidence tending to corroborate the accomplice, that he had been instrumental in setting on fire a house in Newark, New Jersey. It is true that the mere fact that this evidence proved another crime against the defendant did not make it inadmissible, if it was relevant to prove the crime for which the defendant was indicted; but the difficulty is that the crime charged was not a scheme or conspiracy to set fire to two houses, one in Newark and the other in New York, but was that the defendant had set on fire and burned a house in New York.

The rule as to the admission of testimony which tends to prove crimes other than that for which a defendant is indicted, has been much discussed by the Court of Appeals in some late cases. In *The People v. Shea* (147 N. Y. 99) it is said: "The common law of England, however, has adopted another and, so far as the party accused is concerned, a much more merciful doctrine. By that law, the criminal is to be presumed innocent until his guilt is made to appear, beyond a reasonable doubt, to a jury of twelve men. In order to prove his guilt it is not permitted to show his former character or to prove his guilt of other crimes, merely for the purpose of raising a presumption that he who would commit them would be more

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apt to commit the crime in question." The court then proceeded to discuss the limitations of this rule, and said: "Evidence, however, which is relevant to the issue by tending, for example, directly to explain or characterize the act which is in question on a criminal trial has never been held incompetent or inadmissible because it also tended to, or did, prove the accused guilty of another crime;" and it was held in that case that the testimony which was objected to was competent upon the question of the intention and deliberation of the defendant's firing the shot that killed.

In the case of *People v. Sharp* (107 N. Y. 467) Judge PECKHAM, after a review of all the cases, affirms the general rule before stated, "that when a man is put upon trial for one offense, he is to be convicted, if at all, by evidence which shows that he is guilty of that offense alone, and that, under ordinary circumstances, proof of his guilt of one or a score of other offenses in his lifetime is wholly excluded. But for the purpose of showing guilt of the offense for which the prisoner is on trial, as also for the purpose, where that is important, of showing the motive or intent with which an act claimed to be a crime was committed, evidence which is material upon such issues is admitted, although it may also tend to show, or even directly prove, the guilt of the accused of some other felony or misdemeanor."

In this case premeditation or deliberation was not required to be proved. Knowledge of the character of the act was not required to be proved. The defendant was indicted for setting fire to a dwelling house in the city of New York, and the act of setting fire to that house was what the People had to prove. What possible relation had the setting fire to the building in Newark to the burning of this house in New York? It is true that there is evidence that the defendant had stated that he intended first to burn one house and then the other, but when he stated that intention he stated an intention to commit two crimes, only connected with each other because they were of the same general character. He could have been indicted and convicted of arson in Newark whether he had committed the crime of arson in New York or not, and so his guilt of the crime in New York did not depend in any way upon his carrying out his intention as to the Newark crime.

The illustrations in the opinion of Judge PECKHAM in the case of *People v. Shea* (*supra*) show the extent to which testimony of

other crimes is admissible. Thus, where the evidence is admitted to show guilty knowledge of the character of the act committed by the prisoner, as in the case of an indictment for passing counterfeit money, and also in the case of an indictment for shooting an individual, of which the case then before the court is an example. Cases of embezzlement and obtaining money under false pretenses are also noted, where the claim that a false entry by which funds were embezzled was a mistake, is met by proof that other false entries of the same kind had been made about the same time by the same person; and such evidence has been admitted for the purpose of showing the motive for the commission of the crime charged.

Now, it is clear that none of these exceptions can apply to the case at bar. These crimes, as before stated, were absolutely distinct. They had no relation one to the other, except so far as the defendant had admitted to his accomplice that he intended to commit them both. The Newark crime was not so connected with the New York crime by evidence as to make it appear that the same person committed both crimes; and thus evidence that the defendant committed the Newark crime would not be competent to show that he committed the New York crime; nor was the question of motive involved. I can conceive of no principle upon which these crimes were so connected as to make evidence that he committed one crime competent to prove that he was guilty of the other, except upon the principle that a man who would set fire to a house in New Jersey would be quite likely to set fire to a house in New York. The competency of such evidence has been consistently repudiated by the common law. As before stated, it was not competent for the purpose of corroborating the testimony of the accomplice upon any fact tending to show that the crime for which the defendant was indicted was committed, or to connect the defendant with the commission of that crime; for this evidence tended only to corroborate him as to conversations with the defendant about the commission of another crime, and as that did not tend to connect the defendant with the crime for which he was indicted, nor to prove that such crime had been committed, such corroboration was ineffectual, not being such corroboration of an accomplice as the law requires. This evidence was objected to and admitted over the exception of the defendant. The learned trial judge seems to have recognized its incompetency for the purpose of

proving the defendant guilty of the crime and confined its effect solely to the corroboration of the accomplice. The court in the charge to the jury said that the testimony of the Newark fire "was only admitted before you for the purpose of establishing, if it could, some connection of Schoenholz and Zucker with the two fires, and so corroborate the story of Schoenholz that there was to be a fire, according to this conversation with Zucker at Newark;" and the jury were then instructed "not to consider whether he is guilty or not of the fire in Newark, but only whether the circumstances testified to by other witnesses fortify and corroborate Schoenholz and Meyers in the main story which they testified to before you." Now this limitation of the effect of the evidence could not cure the error in its admission if it was not competent to prove the fact of such corroboration, and I think that it was clearly incompetent for that purpose.

I am constrained, therefore, to dissent from the affirmance of this judgment.

Judgment affirmed.

ISRAEL DOUSHKESS, Respondent, v. THE BURGER BREWING COMPANY
(LIMITED), Appellant.

Action for the breach of a promise to loan money repayable on demand, when maintainable — measure of damages.

The general rule is that an action cannot be maintained for the breach of a contract to loan money repayable on demand; but where a brewing company agrees, for a valuable consideration, with a saloon keeper, whose fixtures and license are already subject to a valid existing chattel mortgage held by a rival company, that, if he will thereafter sell its beer, it will satisfy the existing chattel mortgage, advance him an additional sum and take as security a chattel mortgage for all the moneys thus to be paid and advanced by it, and after paying such additional sum it receives from the saloon keeper a chattel mortgage for the amount of the money advanced, and also for the amount of the existing mortgage, but thereafter fails to satisfy the existing chattel mortgage, as a result of which such existing mortgage is subsequently foreclosed for the reason that the saloon keeper is unable, because of the existence of the chattel mortgage thus given to the first-mentioned brewing company, to raise any money to pay the first mortgage, the saloon keeper may maintain an action against such brewing company for damages resulting from the breach of its promise.

In such a case the measure of damages is the difference between the value of the property and the amount of the liens upon it; and, in view of the fact that the

chattel mortgage given to the rival brewing company contained a stipulation that, if a sale should be had under it, the charges incurred in its foreclosure should be deducted from the proceeds, he is also entitled to recover the expenses of the foreclosure.

APPEAL by the defendant, The Burger Brewing Company (Limited), from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 12th day of November, 1896, upon the verdict of a jury, and also from an order entered in said clerk's office on the 11th day of November, 1896, denying the defendant's motion for a new trial made upon the minutes.

John Fennel, for the appellant.

Terry Smith, for the respondent.

PATTERSON, J. :

The averments of the complaint herein set forth a cause of action for damages for the breach of a contract to loan the plaintiff a certain sum of money. The answer substantially admits the making of the contract, but sets up special matter in excuse and justification of non-performance of it. It appeared in evidence on the trial that the plaintiff was the owner and had in his possession certain fixtures and chattels, constituting the equipment of a liquor saloon in Madison street in the city of New York. On the 1st day of May, 1894, that personal property, and also a liquor tax certificate, were subject to a chattel mortgage which the plaintiff had given to the Consumers' Brewing Company of the city of New York, and at that time that chattel mortgage was a lien upon the whole property and was payable on demand. On that day one Prince, who was the representative of the defendant, agreed with the plaintiff to loan him the sum of \$700 and to take from him his promissory note, payable on demand, for that amount, to be secured by a chattel mortgage upon the same property covered by the chattel mortgage to the Consumers' Brewing Company. At about the same time, Prince, on behalf of the defendant, made an arrangement with the plaintiff by which the latter agreed to sell in his beer saloon only beer manufactured by the defendant, in consideration of which and as collateral to the agreement for the loan, the representative of the defendant stipulated that he would not call for the payment of the

mortgage so long as the plaintiff dealt exclusively in beer manufactured by and purchased from the defendant, and it was shown in evidence that this collateral contract was of the same general character as one that had been made between the plaintiff and the Consumers' Brewing Company, and that such contracts were usual between brewers and their customers. The obvious purpose of the defendant in making the agreement and the consideration inducing it, was the securing of the trade of the plaintiff by making him its customer and taking him away from a rival dealer. It is unnecessary to refer to the affirmative defenses, for the issues as to them were submitted to the jury as requested by the defendant, and upon conflicting evidence the jury found on these issues in favor of the plaintiff.

The real question involved here is as to the liability of the defendant for the breach of the contract. The contention is made that the plaintiff is not entitled to recover substantial damages because the terms of the contract contemplated a loan on demand, and it is claimed that there is nothing in the evidence to show that any substantial damages resulted from the breach of the contract. We had occasion to consider the general question of the liability of a person for the breach of a contract to loan money payable on demand in the case of *Goldsmith v. Holland Trust Co.* (5 App. Div. 104), and it was there pointed out that each case brought upon such a contract must stand upon its own peculiar facts and that no general rule can be laid down as to what constitutes substantial damage for the breach of such a contract. It is unnecessary to reiterate what was there said, nor to refer again to the case of *The Bradford, Eldred & Cuba R. R. Co. v. N. Y. & Lake Erie R. R. Co.* (123 N. Y. 316). The principle upon which liability accrues for the breach of such a contract was correctly stated in this case by the learned judge in his charge to the jury, namely, that generally there can be no recovery of damages for the failure to loan money when, according to the contract of loan, it is to be payable on demand, and that the case must be an exceptional one which authorizes a recovery for the breach of such a contract. The facts in this case show that it is an exceptional one and it is now disposed of, as was the *Goldsmith* case, upon its exceptional state of facts.

The defendant, evidently, was seeking to make the plaintiff one of its customers; it knew the situation of the plaintiff and his relations to the Consumers' Brewing Company. Desiring to make the plaintiff one of its new customers, it offered him the inducement of loaning him on his fixtures and personal property (exclusive of stock) in his liquor saloon the sum of \$100 more than had been loaned him by the Consumers' Brewing Company. It offered him this inducement to become its customer and to accept its accommodation. One hundred dollars were given in money by the representative of the defendant; the plaintiff executed and delivered to the defendant a mortgage upon his property for the amount of \$700, and not only did he deliver it, but the defendant placed it on file so as to make it a lien upon all the property mentioned in the schedule. But the \$600 that remained were not paid, and the defendant assumed the obligation and made the distinct promise that that sum of \$600 would be paid by it to the Consumers' Brewing Company, and the mortgage of the Consumers' Brewing Company thus be satisfied and extinguished. The defendant undertook to do that itself, to which the plaintiff assented, and thus the whole consideration of the mortgage was to be paid. The defendant did not pay the Consumers' Company that money; the plaintiff continued to buy the beer of the defendant and to sell no other beer, and discontinued his relations with the Consumers' Company, which latter company, not being paid on demand the money secured by its mortgage, seized the property covered by it and sold it, and this was simply brought about as a consequence of the defendant's neglect to pay the \$600, part of the consideration of the mortgage which it held and had placed on file; and by reason of that mortgage being thus a lien upon the property, it was impossible for the plaintiff to raise elsewhere the money with which to discharge the Consumers' Brewing Company mortgage, for all the property did not exceed in value the sum of \$900 and the surrender value of the license. The lien standing upon it held by the defendant was \$700, and, therefore, there was a mere balance not to exceed \$300. The learned judge was right in his charge when he stated what the claim of the plaintiff was with reference to his inability to raise money to pay the loan of the Consumers' Company. Although the plaintiff may not have formulated it in the words in which it was presented to the jury by the court,

the language used by the court was a correct statement of what the claim of the plaintiff was.

The loss to the plaintiff by the foreclosure was the direct result of the failure of the defendant to apply the money according to its promise to satisfy the Consumers' Company lien. Had the money been used as the defendant agreed to use it, the property would have been saved to the plaintiff; and the excuse for not advancing it being by the verdict of the jury an insufficient one, the responsibility for the loss to the plaintiff rests upon the defendant.

The only remaining question is as to the measure of damages. There was nothing whatever in the evidence to justify any recovery for the loss of profits. But the real measure of damages in this case is the difference between the value of the property and the amount of the liens upon it. This property cost the plaintiff \$900. The tax certificate had a surrender value; it had ten months to run; the surrender value was \$180; that is to say, the value of the unexpired term of the license was that sum. Only a few weeks before the foreclosure, the plaintiff bought the saloon equipment for the sum of \$900, and there is evidence from which it may be inferred that that was about its fair value. The defendant advanced \$100 to the plaintiff, and the property was subject to a lien of \$600, and, therefore, the plaintiff's interest in it was about the sum of \$200. The value of the license, \$180, should be added to this sum. The verdict of the jury was for \$425, of which sum \$50 was for expenses of the foreclosure proceeding. Those expenses were allowed by the jury as damages sustained by the plaintiff, and that was properly done, because, under the terms of the chattel mortgage to the Consumers' Brewing Company, it was stipulated that, from the proceeds of sale under that mortgage, if one were had, should be deducted the charges incurred in the foreclosure. The verdict of the jury was for five dollars less than the plaintiff was entitled to, and the amount fixed by them not being in excess of that to which the plaintiff was entitled, no occasion exists for interfering with the verdict.

The judgment should be affirmed, with costs.

RUMSEY, O'BRIEN and PARKER, JJ., concurred; VAN BRUNT, P. J., dissented.

Judgment affirmed, with costs.

PEOPLE OF THE STATE OF NEW YORK ex rel. SOLOMON COHEN, Relator, v. JAMES J. MARTIN and Others, Commissioners, Composing the Board of Police of the Police Department of the City of New York, Respondents.

New York police commissioners — charge that a policeman procured his appointment by fraud — written charges and a hearing, not required.

An investigation by the police board of the city of New York of a charge that a member of the force, prior to his appointment and while passing a civil service examination, did not, as required by its rules, himself subscribe the certificate of a surgeon relative to his eligibility, but procured it to be subscribed in his name by another person, does not relate to any offense committed by the accused as a member of the force, but is directed to the question whether he was ever legally appointed as such; and hence no written charges or specifications need be served upon him, nor need the hearing of the charge be conducted in the manner required by law where the member upon trial is a lawful appointee.

CERTIORARI issued out of the Court of Common Pleas for the city and county of New York, and attested the 14th day of February, 1895, directed to James J. Martin and others, commissioners, composing the board of police of the police department of the city of New York, commanding them to certify and return to the clerk of the Court of Common Pleas for the city and county of New York all and singular their proceedings in relation to the dismissal of the relator from the police department of the city of New York.

Abraham Levy, for the relator.

Terence Farley, for the respondents.

PATTERSON, J. :

The relator, claiming to be a member of the police force of the city of New York, and that he had been unlawfully stricken from the roll of the police department by the respondents, procured a writ of certiorari to review their action. They have made a return of their proceedings and of the record of an investigation made by them upon the disclosures contained in which they passed the resolution dropping the relator from the roll of membership of the

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police force. The relator was accused of securing his place on the force by a gross fraud, and a violation of the civil service rules. It was shown that he had passed a sufficient examination as to mental qualifications to serve as a policeman; but it was required, as a condition precedent to his lawful appointment, that as an applicant passing the civil service examination, he should subscribe the surgeon's certificate of his eligibility. The charge made against the relator, in substance, was, that he did not personally sign his name to the surgeon's certificate required by the civil service board. The principal objection taken to the action of the respondents is, that the proceeding was not conducted in a lawful and proper manner; that no written charges or specifications were served upon the relator, and that he did not have such a hearing as he was entitled to as a member of the police force. But the charge against him did not relate to any offense committed by him as a member of the force. The proceeding was merely an investigation into matters preceding his appointment, and related to the subject of his ever having been lawfully employed upon the force. What was said by the General Term of the Supreme Court in the case of *Krushinsky v. Martin* (91 Hun, 425) directly applies to this case. Under the authority of the decision in that case, the proceedings had by the police commissioners were regular and proper, and there is no force in the objection that he did not have a proper hearing, so far as the form and methods of procedure are concerned.

The evidence before the commissioners was sufficient to authorize the action they took. There was proof upon which they were entitled to act, namely, a comparison of handwriting and the testimony of an expert. The signature of the relator to his examination as to mental qualifications was genuine and it differed most widely from the signature affixed to the surgeon's certificate of physical qualification. The differences were not those incidental and ordinary variances that are to be observed in different genuine signatures of the same person, but they were so radical in their character as to indicate that they were not made by the same person. The expert witness gave his reasons and pointed out the inherent characteristic variations tending to show that the signatures were made by different persons, and the inspection of the writing made by the police commissioners was sufficient to satisfy them of the fraud that had

been perpetrated in the procurement of the appointment. No explanation was made or attempted to be made on behalf of the relator, although all the facts were within his personal knowledge.

The writ of certiorari must be quashed and the proceedings dismissed, with costs.

VAN BRUNT, P. J., RUMSEY, O'BRIEN and PARKER, JJ., concurred.

Writ dismissed, with costs.

In the Matter of the Application of EMILE F. FRIEDELLE for Revocation of the Probate of the Will of WILHELMINE DOROTHEA SCHOTT, Deceased.

EMILE F. FRIEDELLE, Respondent; FRANKLIN TRUST COMPANY, as Executor, etc., of WILHELMINE DOROTHEA SCHOTT, and Others, Appellants.

The Surrogate's Court — power to dismiss a proceeding for the willful failure of the petitioner to serve the citation.

A Surrogate's Court has the power to dismiss a proceeding brought to revoke the probate of a will, where it appears that the petitioner has willfully refrained from serving certain persons with a citation before its return day.

APPEAL by the Franklin Trust Company, as executor, etc., of Wilhelmine Dorothea Schott, and others, from an order of the Surrogate's Court of the county of New York, entered in the office of said Surrogate's Court on the 10th day of June, 1897, denying their motion to vacate an order theretofore made and to dismiss the proceeding.

Horace E. Deming, for the appellants.

H. S. Chatfield, for the respondent.

PATTERSON, J.:

This is an appeal from an order of the Surrogate's Court denying a motion made, among other things, to dismiss a proceeding for revocation of the probate of a will. The application to dismiss was made upon the ground that the person by whom the proceeding was instituted had willfully refrained from serving certain persons with

the citation before the return day thereof. The motion was denied, according to the recital of the order, on the ground that the surrogate had no power to dismiss the proceeding for failure to serve or to commence to serve the original or supplemental citation upon the parties necessary to the proceeding, or for failure to apply for and take out proper citations.

It would appear from the decision that the learned court below based its order upon what it deemed to be the effect of the ruling of the Court of Appeals in *The Matter of Will of Gourand* (95 N. Y. 256). What was decided in *The Matter of Gourand* with reference to the subject involved in this motion is, that in a proceeding for the revocation of the probate of a will, it is not essential to have a citation issued and served within a year in order to commence a contest within the meaning of the statute. Giving that decision of the Court of Appeals its fullest effect, it does not meet the question raised here, which is, as to the power of the Surrogate's Court to dismiss proceedings of this character for fraud or gross neglect to serve process, the issuance of which has been procured by a party who willfully refrains from making service or attempting to make service of the process in his hands for service, and thus obstructs the administration of the law in his own case. Such a power and authority reside in a court of record, and are by provision of the statute among the incidental powers of the Surrogate's Court. Section 2481 of the Code of Civil Procedure enumerates the powers of the surrogate in court and out of court, and subdivision 11 provides that with respect to any matter "not expressly provided for in the foregoing subdivisions of this section, to proceed in all matters subject to the cognizance of his court, according to the course and practice of a court having by the common law, jurisdiction of such matters, except as otherwise prescribed by statute, and to exercise such incidental powers as are necessary to carry into effect the powers expressly conferred."

It is not to be doubted that a court of common law has jurisdiction to dismiss an action where that jurisdiction is being fraudulently and oppressively used. The surrogate having complete jurisdiction over a proceeding for the revocation of the probate of a will, this 11th subdivision confers upon him incidental powers otherwise not provided for, among which we conceive to be the same power that

a court of common law has to dismiss an action in the cases suggested.

We are, therefore, of the opinion that the surrogate is not without power, upon a proper showing, to dismiss a proceeding of this character palpably begun in fraud or conducted in such a way as to indicate that the purpose of its institution is merely to embarrass the settlement of an estate, or to interfere with executors in the proper discharge of their duties, or to throw upon them burdens and obligations which they should not be compelled to assume; in other words, instituted and carried on in bad faith. We only decide that the surrogate is not without power, in a proper case, to dismiss a proceeding of this character, and, therefore, the order appealed from must be reversed and the matter remitted to the Surrogate's Court in order that it may pass upon the merits of the application.

Order reversed, with costs.

VAN BRUNT, P. J., RUMSEY, O'BRIEN and PARKER, JJ., concurred.

Order reversed, with costs.

EUGENE O'SULLIVAN and Others, Respondents, v. THE NEW YORK ELEVATED RAILROAD COMPANY and THE MANHATTAN RAILWAY COMPANY, Appellants.

Evidence—action against an elevated railroad for rental damages—examination of witnesses as to rental values of specific properties, allowable only on cross-examination.

Where the evidence given upon the part of abutting owners, in an action brought by them to recover rental damages resulting from the maintenance and operation of an elevated railroad in the city of New York, is confined strictly to showing, by persons competent to speak, the general course and current of values, the defendant is entitled to cross-examine such witnesses as to particular properties and as to their rental history, but it is not entitled to examine, subsequently, and as a part of its own case, its own witnesses in chief as to the rental history of specific properties situated in the same streets as to which it had already cross-examined the witnesses of the plaintiffs.

APPEAL by the defendants, The New York Elevated Railroad Company and another, from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the

county of New York on the 5th day of August, 1896, upon the decision of the court rendered after a trial at the New York Special Term, with notice of an intention to bring up for review an order of the Superior Court of the city of New York, entered in the office of the clerk of said court on the 26th day of November, 1895, continuing the action and substituting parties plaintiff.

Julien T. Davies and Brainard Tolles for the appellants.

Joseph H. Choate, for the respondents.

PATTERSON, J. :

This is one of the ordinary suits brought to restrain the operation of elevated railways and, as incidental thereto, to recover damages for impairment of rental values caused by the maintenance of the defendants' structure and the use of the same as a railway in front of the plaintiffs' premises. The subject of fee damage has been eliminated from the case, that matter having been settled by the defendants making compensation (since the judgment herein was entered) for the easements taken. We have, therefore, to consider only so much of the case as is involved in the claim for past damages to rental value, covering a period of something over nineteen years, viz., from the time of the completion of the railway structure up to the date of the trial. The premises are Nos. 148, 150 and 152 Pearl street, an important piece of property, forming the southeast corner of Pearl and Wall streets, and No. 92 Pearl street, between Wall street and Old Slip.

The main objection urged by the defendants on this appeal is that the awards are excessive. The argument is made that the trial justice fixed the amount allowed by him as damages for depreciation in rental value upon an erroneous basis, and hence the claimed exorbitant award. An attentive reader of the voluminous record before us could not fail to be impressed by the fact that within the scope of the evidence the amount awarded might have been very largely increased had the judge below adopted one theory upon which a recovery might be sustained, viz., the application of an established ratio between rental and fee value; but it is evident, from the result arrived at, that that means of ascertaining the amount of damages was not used by the court. It is assumed by

the appellants that as to the more important, *i. e.*, the corner properties, the justice at Special Term resorted to an easy and offhand method of reaching the result attained by first arbitrarily fixing a certain annual sum at which he conceived the property would have rented but for the existence and operation of the road; then deducting from that the rents actually received each year and allowing the resultant balance as damages. There is nothing to justify such a criticism of the decision of the court below. It is not stated by the judge to be the method by which he reached his conclusion, and it is not to be inferred from forced coincidences, the product of ingenious arithmetical calculations. The question to be determined was the diminution, if any, of rental values caused by the presence and operation of the elevated railway in front of the premises of the plaintiffs, and arising from that and that alone. It is claimed by the defendants that there were other operative causes diminishing rental values; that the buildings are old and not able to compete with the more commodious, better-constructed and more desirable modern structures somewhere in the vicinity. There is nothing to show that the court below did not take into consideration all the evidence bearing upon that matter. There was conflicting evidence respecting it. One witness (Golding) swore that to his own knowledge, and within his own experience as an agent for renting very many of the newest and best-equipped modern buildings in the lower part of the city, the erection of that very superior class of office buildings did not materially affect the occupation or rental value of the older and less convenient buildings, and this would apply peculiarly to such exceptionally well-situated property as that of the plaintiffs, the subject of this suit. It was for the court to weigh all the proofs, and we are not able to discover that it failed to do so fairly and wisely or that it ignored any evidence relating to either or all of the elements properly addressed to the solution of the one question, as to rental value, before it for determination. Upon an analysis of the whole evidence, sifting the testimony of the witnesses on both sides, and comparing their statements and regarding the history of this particular property and the undoubted effects of the operation of the road upon it, we think the conclusion of the court was just and altogether reasonable. The same may be said concerning the premises No. 92 Pearl street.

A ruling of the trial justice rejecting certain testimony offered by the defendants has been made the subject of elaborate discussion by the appellants. The plaintiffs, in presenting their proofs as to the decline of rental values, kept themselves scrupulously within the rule laid down in *Jamieson v. Kings Co. El. R. R.* (147 N. Y. 322). They confined themselves strictly to showing "the general course and current of values * * * by persons competent to speak." On cross-examination these witnesses were interrogated as to particular properties; and the extent of their knowledge and the reliability of their testimony were thus tested by an examination as to their acquaintance with the history of such specific properties. That was legitimate cross-examination and within the permission of the rule in *Jamieson's* case. But when the defendants came to put in their case they sought to examine witnesses in chief as to the rental history of specific properties situated in the same streets, as to which on cross-examination they had interrogated the plaintiffs' witnesses. That evidence was excluded, and it is now contended that the defendants were entitled to it, and that the rule in the *Jamieson* case did not compel its exclusion, because it was addressed, *first*, to showing that the plaintiffs' experts were not possessed of sufficient knowledge to enable them to give reliable testimony; *second*, to show the existence of other causes tending to reduce rents than the presence and operation of the elevated railway, and, *third*, to rebut any inference to be drawn from the testimony of the plaintiffs' witnesses that the elevated railway was the sole cause of the decline in the rentals of the plaintiffs' property.

The argument of the appellants is plausible, but if we are to follow and be governed by the rule as deduced from the *Jamieson* case, and subsequently reannounced in the *Witmark Case* (149 N. Y. 393), that argument is unsound. What is that rule? In a word, that such evidence as that sought to be given here is incompetent, relating as it does to purely collateral matter. It may be introduced on cross-examination and there it ends. The kind of evidence condemned in the cases referred to is not admissible in chief for any purpose. The errors of experts or other seemingly qualified persons may be shown, and the inferences to be drawn from their testimony rebutted by better instructed persons on the other side, and the operation of causes other than the elevated railway in reducing

rents must be shown by independent proof of such causes and not by deductions from the experience of particular landlords in renting their respective properties, which would necessarily involve inquiries into every detail of plan, condition, state of repair and general administration of each house made the subject of investigation. Where that would lead to is well stated in the *Witmark Case* (p. 400), in which it is said: "The extent of the investigation would be subject to no limits except such as might be presented by the discretion of the trial court, and even when it could be shown that the property was substantially similar as to locality and surroundings, yet different parcels of property are affected in their values by so many different causes that in the end there must be left a wide field for conjecture and speculation. The scope of the inquiry would be enlarged beyond all necessary and proper limits, and the minds of the court and jury confused with a multitude of conflicting and irrelevant facts." The court below was right in its ruling as to this rejected evidence, unless we have altogether misapprehended the ruling in the *Jamieson* case, the reasons given for it and the necessary consequences of it. No other exception requires consideration, and the judgment must be affirmed, with costs.

VAN BRUNT, P. J., RUMSEY, O'BRIEN and PARKER, J.J., concurred.

Judgment affirmed, with costs.

DANIEL M. RANDELL, Appellant, v. NATIONAL RIVET AND NOVELTY COMPANY and Others, Respondents.

Default — not opened where the party has deceived the court.

A default will not be opened where it appears that the plaintiff who moves to open it and vacate a judgment entered thereon has imposed upon his own attorney and practiced a gross deceit upon the court by exaggerating his bad condition of health and pretending to be unable to travel when he could have done so and was at the time transacting business at his own office.

APPEAL by the plaintiff, Daniel M. Randell, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 3d day of June, 1897, denying his motion to vacate a judgment

and open a default taken against him on the cause being called for trial at the New York Special Term.

John V. Bouvier, Jr., for the appellant.

Frederic R. Kellogg, for the respondents.

PATTERSON, J. :

The cause was duly and regularly upon the day calendar. The plaintiff's attorneys moved to postpone the trial on the alleged ground of the serious illness of the plaintiff at his residence in Indianapolis. It was claimed that he was a material and necessary witness, and that knowledge of his illness came to the plaintiff's attorneys after the cause had been removed from the general to the day calendar. Upon conflicting affidavits, the justice presiding at the Special Term declined to postpone the trial, and thereupon the complaint was dismissed and judgment of dismissal and for costs was entered against the plaintiff. Subsequently a motion, in due form and on notice, was made before another branch of the court, having cognizance of litigated motions, to vacate the judgment and open the default. Affidavits were presented on both sides, and after argument the motion was denied. Two justices of the court have passed upon the merits of the application, and it is apparent that both were convinced that the plaintiff not only imposed upon his own attorneys, but practiced a gross deceit upon the court by exaggerating his condition of health, and pretending to be unable to travel to New York to attend the trial when he could have done so, as was shown by the fact that he was transacting business at his own office and at a place fifty miles distant therefrom. The deceit consisted in his sending false statements concerning his health, to the effect that he was confined by illness to his house. It was evident to the court below that he was trifling with it, and that it suited his convenience to attend to his affairs at and near his home, rather than proceed with the trial of the cause here. We cannot say that the justice by whom this motion was decided took an erroneous view of the situation; and that is all it is necessary to say on the subject.

The order is affirmed, with ten dollars costs and disbursements.

VAN BRUNT, P. J., RUMSEY, O'BRIEN and PARKER, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements.

MARY H. MYER, Individually and as Trustee, etc., of CLARK L. SHARPSTEEN, Deceased, and as General Guardian of MARY HELENA SHARPSTEEN, an Infant, Appellant, v. LEON ABBETT, Individually and as Survivor of the Partnership of ABBETT & FULLER, and Others, Defendants.

HASCALL, CLARKE & VANDERPOEL, Claimants, Respondents.

General Rule No. 27 — it does not permit an order fixing the value of attorneys' services to a party to an action, to be docketed as a judgment.

RULE 27 of the General Rules of Practice prescribing, among other things, that "Any order or judgment directing the payment of money, or affecting the title to property, if founded on petition, where no complaint is filed, may, at the request of any party interested, be enrolled and docketed, as other judgments," is intended to cover that class of applications which can be made only by petition and has no application to an order, made upon the decision of a contested motion, by which the claims of attorneys for services rendered to a party to the action are adjusted; and it is consequently improper for an order in the latter case to direct that judgment be docketed against the party liable, in favor of the claimants, for the amount of their services as fixed.

APPEAL by the plaintiff, Mary H. Myer, individually and as trustee, etc., of Clark L. Sharpsteen, deceased, and as general guardian of Mary Helena Sharpsteen, an infant, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 26th day of March, 1897, overruling exceptions theretofore filed to the report of a referee and confirming said report, and also from a judgment entered upon said order in the office of the clerk of the county of New York on the 26th day of March, 1897.

Edward W. S. Johnston, for the appellant.

John H. Judge, for the respondents.

PATTERSON, J.:

The appeal from the order confirming the report of the referee brings up for consideration, in the first place, the finding made as to the value of the services rendered to the plaintiff by the claimants, the attorneys who represented her immediately before the substitution of her present attorneys. On examining the record to ascer-

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tain what services were performed, and the value thereof, we find that they extended over a period of something more than two years; but they were not of such a character as involved any special skill or unusual labor, and assuming, as was undoubtedly the fact, that they performed all the services precisely as they state, it is evident that many of the items contained in the account are ordinary routine services, for which no specific charge was or could be made. The whole bill is for services rendered in one action. When the claimants, whose bill is now under examination, came into the case, it was at issue, and had been on trial for a long time before a referee. Taking into consideration the statement of items of their bill, and bearing in mind that there is but one subject of employment, and that their services were in connection with a case taken up by them before a referee, and the trial of which is still unfinished, we think there has been too liberal a valuation placed upon the services of these attorneys. There was conflicting evidence of expert witnesses as to the value of the services, but we are of the opinion that the estimates of value made by the two New York attorneys, testifying on behalf of the plaintiff, was the more reasonable and proper one under all the circumstances of the case. The order, therefore, with reference to this matter should be modified by reducing the amount of the value of the services to the sum of \$2,000, which is the precise value put upon them by the claimants before any litigation was had. Seven hundred and sixty-five dollars having been paid on account, the balance of \$1,235 remains, to which should be added \$44.91 disbursements, making a total now due and unpaid of \$1,279.91.

There is a provision contained in the order that judgment be docketed against the plaintiff in favor of the claimants for the amount of their services as fixed, and this appeal involves the propriety of that provision. It is claimed that under rule 27 of the General Rules of Practice such a provision was authorized. The rule referred to has no application to a proceeding of this character, and was not intended to accomplish such a purpose. It refers only to orders granted on petitions where no complaint is filed, and was intended to cover that class of applications that could be made only on petition, and does not relate in any way to orders entered upon the decision of ordinary motions such as this is. The provision relating to the entry of judgment must be expunged.

The order appealed from must be modified in accordance with the foregoing views, and as modified affirmed, without costs of this appeal to either party.

VAN BRUNT, P. J., RUMSEY, INGRAHAM and PARKER, JJ., concurred.

Order modified as directed in opinion, and as modified affirmed, without costs.

WILLIAM J. RAND, Appellant, v. MASSACHUSETTS BENEFIT LIFE ASSOCIATION, Respondent.

Life insurance—reinsurance of the risks of another company not within the prohibition of the statute forbidding the taking of risks on lives of over sixty years—proof as to restrictions in a foreign statute.

Quære, whether a statutory provision which forbids a benefit life insurance association to take risks on the lives of persons over sixty years of age, applies to the case of the reinsuring of the risks of another insurance company.

The recovery of premiums paid on such a policy, on the ground that they were paid without consideration, not sustained where there had been a default of payment forfeiting the policy.

The question as to the validity, under the laws of another State, of a policy of insurance claimed to be in violation thereof, presents a question of fact which must be established by proof.

APPEAL by the plaintiff, William J. Rand, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 15th day of January, 1897, upon the decision of the court rendered after a trial at the New York Trial Term dismissing his complaint upon the merits, the action having been tried by the court without a jury upon an agreed statement of facts.

David K. Case, for the appellant.

J. K. Hayward, for the respondent.

PATTERSON, J.:

The cause of action as set forth in the complaint is based upon allegations of fraud. The averments are, in substance, that with

intent to cheat and defraud the plaintiff's assignor, and thereby procure him to pay to it certain moneys, the defendant, through its agents, falsely and fraudulently represented that it was duly authorized to issue to him a certain policy of life insurance, whereas, in fact, it was prohibited by statute from so doing. The defendant is a Massachusetts corporation, and at the time it issued its policy to the plaintiff's assignor it was not allowed to take risks on the lives of persons over sixty years of age, the plaintiff's assignor being at that time about sixty-two years old. Knowledge of the alleged misrepresentation is charged, and the deceit claimed to have been practiced is the only foundation of the action. All fraud is fully denied in the answer. The cause was submitted at the trial on an agreed statement of facts, from which it conclusively appears that, if a determination were to be made under and according to the issues as they are framed by the pleadings, the judgment appealed from is manifestly right. The plaintiff failed altogether to sustain his complaint. There is not one syllable of proof to show fraud or deceit. The substance of the charge is that the defendant, being forbidden by law from taking a risk on the life of a person of the age of the plaintiff's assignor, stated that it could make a valid contract with him (doubtless what is meant is that the agent concealed its want of authority to make the contract), issued its policy, allowed him to pay assessments and mortuary calls, while he was in ignorance that its contract with him was void and would be unenforceable. The agreed statement of facts shows that an intent to defraud did not exist, and that there is no ground for even the slightest inference against the honesty and good faith of the defendant in the transaction. The plaintiff's assignor, prior to December 10, 1889, held a policy of insurance in the Security Mutual Benefit Society of New York. That company was consolidated with the defendant at the date mentioned, the latter taking over the outstanding risks of the former by way of reinsurance, and issuing its policies in exchange for those of the Security Company. The Massachusetts statute allowed companies chartered by that State to consolidate with other and similar corporations. The plaintiff's assignor was within the age limit when he took out his policy in the Security Company. He surrendered that policy to the defendant, pursuant

to the consolidation scheme, and accepted the substituted policy of the defendant. In the agreed statement of facts it is admitted "that the defendant was advised, at the time of said consolidation, by counsel learned in the law, that it had good right to receive and give good insurance to such consolidates then upwards of sixty years of age, and that its action in said transaction was in pursuance of said advice, and in the belief that it was acting legally in the premises." That part of the stipulation disposes effectually of the cause of action arising out of alleged fraud.

There is, however, another view of the case requiring consideration. It was submitted for decision, apparently without regard to the real nature of the cause of action, and the parties thus invited the court to dispose of the controversy between them on the general merits of the plaintiff's claim to recover the moneys his assignor had paid on the policy. In that situation it is urged that, on the conceded facts, the plaintiff is entitled to recover as in an action for money had and received, the amount of the annual assessments and mortuary calls his assignor had paid the defendant after September, 1889, there being, it is claimed, no other consideration for such payments than the void promise or obligation of the defendant. The proofs as made are insufficient to show that the defendant has received moneys of the plaintiff's assignor which, *ex æquo et bono*, it should not retain. It is not shown as matter of fact that the contract of insurance was void. The validity of that contract, under the laws of Massachusetts, is a question of fact in the courts of this State. It is proven that the plaintiff's assignor failed to keep alive his policy; he defaulted on payments due and called for. It is further shown that the defendant assumed many millions of "over-age" risks from consolidated companies, and has always paid without objection every honest claim made under such policies. It is not contended that the consolidation of the two companies was unlawful, nor that the taking over by the defendant of the Security Company's outstanding risks was anything other than reinsurance. There is nothing in the Massachusetts statute fixing an age limit, which applies in terms to reinsurances, which are permitted to be made. The prohibition, by reasonable construction, relates to original risks taken in the first instance by an insuring company; and as the trial judge remarked, "in such a case (as this) the absorb-

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ing corporation is not required to refuse the transfer of risks of the other company, because the insured happens at the time of the consolidation to be over sixty years of age." It is not shown, therefore, that the defendant has received moneys on a void contract, or that it would be inequitable to allow it to retain what it has received from the plaintiff's assignor.

On the facts as they are made to appear, the judgment was properly directed and must be affirmed, with costs.

RUMSEY, O'BRIEN and PARKER, JJ., concurred ; VAN BRUNT, P. J., concurred in result.

Judgment affirmed, with costs.

FRANCES J. NOBLE, Appellant, v. FREDERICK H. NOBLE, Respondent.

Reservation in a decree of divorce of the right to apply for alimony.

Unless a provision for alimony is contained in the final judgment in an action for divorce it cannot be awarded by a subsequent order, but where such a judgment contains a provision that the plaintiff "may apply at the foot of this judgment, as she may be advised, for such other provision, touching an allowance or otherwise, as any change in the circumstances of the parties may require," the court may thereafter make a provision for her support when it is shown that the defendant's circumstances have changed since the decree of divorce was entered.

APPEAL by the plaintiff, Frances J. Noble, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 28th day of April, 1897, denying her motion to modify a decree of divorce in her favor theretofore granted in the action.

David May, for the appellant.

Charles H. Kelby, for the respondent.

PATTERSON, J. :

The order appealed from was made on the denial of a motion of the plaintiff for a modification of a decree of divorce entered in her favor against the defendant, and by which she asked that provision

be made for the payment to her, by the defendant, of a sum of money for the maintenance and support of herself and of her two infant children, who are in her custody and under her control. She sets forth her inability to provide for and support the children. In the decree of divorce referred to, no express provision was made either for alimony to the plaintiff or for the support, education or maintenance of her children. But those matters were not left totally unprovided for, it being inserted in the decree as one of its provisions, that the plaintiff "may apply at the foot of this judgment, as she may be advised, for such other provision, touching an allowance or otherwise, as any change in the circumstances of the parties may require." It is the settled law of this State that, unless alimony is provided for in the final judgment, it cannot be awarded by subsequent order, but providing for alimony does not necessarily mean the allowance by specific mention of a fixed and definite sum. Section 1759 of the Code of Civil Procedure relates to modifications of provisions as to alimony made in a judgment. Section 1771 of that Code relates to applications before final judgment, or modifications of final judgments, containing provisions for the support and maintenance of children only. This application in its nature, and under the circumstances of the case, seems to come within the purview of the Code. There is a reservation of power in the decree to make a further order for allowance, and the reservation is sufficiently broad to allow an application of this character to be made. In *Galusha v. Galusha* (138 N. Y. 281) it is said that alimony need not be determined when the judgment dissolving the marriage is entered, providing the right to have it subsequently determined is reserved in the judgment. And in *Stahl v. Stahl* (12 N. Y. Supp. 855) it was held by the General Term of the Supreme Court "that the reservation of this right of supervision, being a part of the original decree, was designed to continue the subject to which it related within the jurisdiction of the court, and was in effect a continuation of the power of the court over the subject and the parties, and was not, as to alimony, a final judgment." These views are sufficient to indicate that the learned judge below was mistaken in applying to the decision of this application the doctrine of the case of *Kamp v. Kamp* (59 N. Y. 212), and similar cases. But the papers, as they were presented to the court below, would not have justified

the granting of any specific sum, nor a determination of the motion in the plaintiff's favor on the merits. There was nothing to show that the defendant's circumstances had changed since the decree of divorce was entered, and that is something that must be shown to entitle the plaintiff to a modification of the decree, or to a further order.

The order, therefore, must be affirmed, but, under all the circumstances of the case, without costs, and without prejudice to the plaintiff to make a new motion upon proper papers, as she may be advised.

RUMSEY, INGRAHAM and PARKER, JJ., concurred; VAN BRUNT, P. J., concurred in result.

Order affirmed, without costs, and without prejudice to the plaintiff to make new motion upon proper papers.

ANNIE M. PRESCOTT, an Infant, by MARIA PRESCOTT, her Guardian ad Litem, Respondent, v. THE J. OTTMAN LITHOGRAPHING COMPANY, Appellant.

Negligence—failure of the master to have a machine oiled, resulting in its becoming unmanageable and cutting off an employee's fingers.

Proof that if a press was not properly oiled, its clutch, designed to allow the press to make one operation by a pressure of the foot, would "break or throw it out" and "allow the press to keep going right on around without any effect of the treadle at all," coupled with testimony that the press required oiling twice a day, that the master had not appointed any one to see that the machinery was in a safe condition and that an employee lost part of her fingers because the die of the press, which had been oiled only three times in two weeks, instead of stopping when she removed her foot from the treadle, kept plunging and cut off her fingers before she could withdraw them, is sufficient to make the question of the liability of the master to the employee a proper one for the consideration of the jury.

APPEAL by the defendant, The J. Ottman Lithographing Company, from a judgment of the Superior Court of the city of New York in favor of the plaintiff, entered in the office of the clerk of said court on the 6th day of December, 1895, upon the verdict of a jury, and also from an order entered in said clerk's office on the 30th

day of December, 1895, denying the defendant's motion for a new trial made upon the minutes.

The jury rendered a verdict in favor of the plaintiff for the sum of \$2,500.

Henry T. Brennan, for the appellant.

William A. Jones, Jr., for the respondent.

PATTERSON, J. :

There were no exceptions taken on the trial of this cause to the charge of the judge, nor to his rulings upon the admission or rejection of evidence; nor was any testimony introduced by the defendant, who relied alone upon the motion to dismiss the complaint at the close of the plaintiff's case. That motion was properly denied. The judge properly submitted the case to the jury, for they were, at all events, to pass upon the credibility of the plaintiff and the subject of the amount of damages. The plaintiff had failed to show any defect in the construction of the machine at which she was working when the accident happened, but there was testimony tending to show that at that time the machine was not in a safe condition for use by an operator. The claim on the part of the plaintiff was that for the want of proper oiling it had become unsafe. She had been working on the machine only two weeks, and, according to her story, she had used it in the precise manner in which she was instructed to use it by Mr. Myers, by whom she was employed for the defendant. The only question of fact really arising in the case was with reference to oiling the machine. The designer and inventor of this very machine was put on the stand as a witness for the plaintiff, and he testified that the machine required oiling twice every day, running at the speed they had to attain in lithographing and paper cutting, which was the use to which this machine was applied. He also testified that that was a well-known fact among machinists and people familiar with machines. "If the machine is not oiled properly the bearing of the fly wheel that revolves on the shaft is liable to get hot." "The clutch will break or throw out, and will allow the press to keep going right on around without any effect of the treadle at all." "The clutch is to allow the press to make one operation by pressing your foot." That was precisely the situation

at the time of the occurrence which resulted in the injuries to the plaintiff's hand, viz., the die, instead of stopping when the plaintiff's foot was removed from the treadle, kept plunging, and cut off parts of her fingers before she could withdraw them. It appeared by the testimony of the plaintiff, which is entirely uncontradicted, that during the two weeks that she was employed on the machine it was oiled but three times. The point on behalf of the appellant is, that assuming the plaintiff's testimony to be true, as the jury have found it to be, then it is apparent that the unsafe condition of the machine was the result of negligence on the part of some fellow-servant of the plaintiff. But the difficulty with the proposition of the appellant in that regard is that there is not a particle of proof to show that the defendant ever devolved upon any one the duty of oiling that machine in the way required to make it safe, or indeed to oil it at all. No one was charged with that duty, no servant was employed or instructed to do it, so far as the proof discloses. On one of the three occasions when it was oiled the machine was making a noise, and Mr. Myers, the superintendent, sent for an oil can and had it oiled. On the other two occasions it seems that a machinist came and oiled it. There is, therefore, absent from the case any evidence to show that the master gave directions or took any means to provide for the proper and safe running of the machinery, and in that respect the case differs from those cited by counsel for the appellant, in which nonsuits have been granted in actions of this character. Where a defendant has furnished means and conveniences for keeping machinery in proper condition for safe operation, and employed some one whose duty it was to use those means and appliances, the neglect to use them is not chargeable to the master. But in all those cases, of which *Webber v. Piper* (109 N. Y. 496) is a fair example, all that was required of the master had been done by him.

The ruling of the court below in refusing to dismiss the complaint was right. We are unable to say, under all the circumstances of the case, that the verdict was excessive, and, therefore, the judgment and order appealed from must be affirmed, with costs.

VAN BRUNT, P. J., RUMSEY, O'BRIEN and PARKER, JJ., concurred.

Judgment and order affirmed, with costs.

WILLIAM A. HARDT and Others, Plaintiffs, v. JULIUS LEVY and Others, Defendants.

HENRY WINTHROP GRAY, as Receiver of LEVY BROTHERS & COMPANY, Appellant; KINGS COUNTY TRUST COMPANY and Others, Respondents.

Receiver's accounting — when the validity of his appointment cannot be questioned thereon — what services of his attorneys may be allowed for.

Where an order, which has been affirmed at General Term, directs a referee, appointed to take and state the accounts of a receiver of a firm, to "make all such just allowances as the receiver may be entitled to according to law," exceptants to the report of the referee are precluded from questioning the validity of the order under which the receiver was appointed, and the sole question to be considered is whether the payments, for which the receiver asks credit, were proper.

Where the court permits a receiver to be heard on motions affecting his trust, and no objection is then made to his standing in court, that objection cannot be raised later, and the receiver should be allowed the reasonable charges of the attorneys who represented him upon the motions.

Under what circumstances a receiver cannot be allowed for prospective services of his attorneys which may become necessary if an appeal is taken, considered.

APPEAL by Henry Winthrop Gray, as receiver of Levy Brothers & Company, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 24th day of February, 1897, sustaining exceptions to the report of a referee on the accounting of the receiver.

George Zabriskie, for the appellant.

Ira Leo Bamberger and *Benjamin Tuska*, for the respondents.

PATTERSON, J. :

This is an appeal by a receiver from an order made at the Special Term on a motion to confirm the report of a referee who was directed to take and state the accounts of such receiver of all property, assets and effects which came into his hands, and the referee was explicitly instructed to "make all such just allowances as the Receiver may be entitled to according to law." That phrase means all such proper, legitimate and necessary outlay and expenses as the

receiver incurred in the discharge of his duties, and pursuant to the authority with which he was invested by the court as its officer. The referee stated the account of assets realized and of payments made, and reported that the receiver had faithfully performed his duties and accounted for all that he had received. Exceptions were taken by two of the parties to the accounting to certain credits allowed by the referee, constituting important items of outlay made by the receiver in the administration of the receivership. The justice at Special Term sustained the exceptions and expunged from the account all items of disbursement not made or deemed to have been made under specific orders of the court, and disallowed commissions to the receiver. The sole ground on which that action of the court was based is that the appellant "was improperly appointed receiver herein, and that no receivership should have been created herein."

The subject of the validity of the receiver's appointment was not before the court as an original question, and its action founded upon the assumption by which it was influenced was erroneous. The referee was acting strictly within the requirements of the order appointing him; he was performing only the duty devolved upon him. The order commanded him to make "just allowances," and he properly apprehended the force of that command in its general meaning, although some of his conclusions as to particular items were not authorized by the evidence. The order recognized the right of the receiver to have proper credits allowed him; and the circumstances under which that order was made, and the proceedings subsequent to its entry, establish the receiver's right to such proper credits, the propriety at that stage depending not upon a debatable question of the validity of the order under which he acted as receiver, but upon the nature of the payments for which he asked credit. The order was entered upon the denial of a motion made by the defendant Moses Levy, seeking, among other things, to vacate the receivership. The ground of the motion was "that the order appointing the receiver was granted without jurisdiction and was wrongfully obtained by the plaintiff." Directly involved in the very motion, as the outcome of which the accounting was ordered, was the question of the validity of the appointment of the

receiver so far as the jurisdiction to appoint was concerned. An appeal from that order was taken to the General Term, and it was there affirmed (79 Hun, 348), the court remarking that "the burden of expense necessarily and in good faith incurred by him while attempting to carry out the orders of the court" should not be inflicted upon the receiver personally. The court below gave no heed to this determination of the appellate branch of the court as it then was constituted. In this very proceeding, and upon a consideration of the identical order under which this receiver acted, the General Term, with all the circumstances under which the receiver was originally appointed before it, with the whole history of the action in which he was so appointed and all the grounds of challenge of that appointment made plain to it, refused to vacate the appointment and thus affirmed its validity and recognized the receiver's right to protection in all that he properly had done as receiver. It is obvious that the justice at Special Term failed to perceive that the question had been fully passed upon in proceedings growing out of the order before him; and, while the decisions of the Special and General Terms may not have been technically binding as adjudications on the present exceptants, still their effect was indubitably to establish a rule of decision applicable to the question of the validity of the receiver's appointment by whomsoever that question might be raised, if brought up on the same record, under the same state of facts, and on the same point of jurisdiction. No new feature pertaining to the appointment of the receiver has been brought to the notice of the court, and the decision of the General Term should have been followed, for it was controlling as authority.

We approve the findings of the referee as to most, but not as to all, the specific items rejected by the court. Every payment actually made by the receiver was so made while the order of his appointment was standing intact and unreversed and while he was discharging the duty committed to him by the court, and that constitutes a radical difference between this case and those cited in the opinion of the court below on this motion. The payments made to the attorneys for services in this action and in *Gray v. Levy* were proper and lawful payments, fully justified by the necessities of the situation, and according to the testimony relating to the details of

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the services the amounts paid were reasonable. The two sums of \$250 for opposing motions to vacate the order appointing the receiver and making the motion to vacate the leave granted to the Kings County Trust Company to sue the receiver, are not excessive in view of the fact that those charges include services rendered in the preparation and argument of appeals from both orders. It is too late for the trust company to take the objection that the receiver had no standing in court on either of those motions. It should have been raised at the time those motions were made. But it is unavailable in any event, as the court permitted him to be heard and recognized him on the motions. Those charges should be allowed, and all others found by the referee except the following. The amount paid by the receiver's attorney to Mr. Day (\$550) is not proven to have been a necessary disbursement, and there is no adequate reason shown for his employment to perform service which was part of the ordinary routine work of those attorneys themselves, and which, from aught that appears, might have been as well performed by correspondence. The items charged for carpets and window shades should have been disallowed. There was no proof to sustain the items "trial fee, affidavits, &c., \$52.39;" and the same may be said of the items "carriage hire, telegrams, &c., \$14.75;" "service of orders, &c., \$31.35;" "copying records, \$45.00;" "lithographing requests to find, \$24.00;" "serving subpoenas, \$4.08." There is no proper proof to support them, and as they were duly objected to they cannot be allowed. The production of vouchers for them does not prove the necessity of the expenditures, but only the fact of payment.

The referee also allowed certain amounts in reduction of the balance in the receiver's hands which cannot be sustained. Six hundred dollars is thus fixed as compensation to the receiver's attorneys for services on this accounting. According to Mr. Burrill's own testimony, the actual service rendered was worth only \$250, and that is all that should have been allowed. The rest of the charge was for prospective services if an appeal were taken; but the estate should not be charged with that under the circumstances of the case. Commissions were properly allowed the receiver; he was acting under the order of the court; he was fully authorized and was required to perform the duties of the receivership. He diligently

and in good faith performed his duty; his functions were not terminated until after the reversal of the judgment in this case and in the *Gray* action, and he has done nothing to deprive himself of the right to compensation. Had the order of his appointment ever been revoked, a different situation requiring, perhaps, a different conclusion, would have been presented.

The order of the court below must be reversed and the motion to confirm the report of the referee be granted, except as to the items hereinabove mentioned as having been improperly allowed, and as to them the exceptions should be sustained and the receiver's account must be resettled and readjusted by omitting such items therefrom, with costs to the appellant.

VAN BRUNT, P. J., WILLIAMS, O'BRIEN and INGRAHAM, JJ., concurred.

Order reversed and motion to confirm referee's report granted, except as to items mentioned in opinion; as to them, exceptions sustained and receiver's accounts accordingly readjusted, with costs to appellant.

In the Matter of the Application of THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Relative to the Opening of CATHEDRAL PARKWAY.

In re HENRY T. CAREY, as Trustee, etc., of GEORGE DE PEYSTER, and Others, Petitioners, Appellants; MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Respondent; JOHN T. METCALFE and Others, Contestants, Appellants.

Deed—a conveyance of land bounded on a road transfers the title to its center line—effect of a grantor's reference to a map—an award for land taken should not be directed to be paid to the attorneys.

A deed executed in 1801 by the owner of the fee in a portion of the Bloomingdale road in the city of New York, conveyed lands, through which that road ran northerly, in two pieces and described the most westerly piece, lot No. 1, as running to the road and thence along it to lot No. 3, a lot lying directly south of it and abutting on the road. The description of the easterly lot No. 2 was in part "Beginning at the northwest corner of lot number four (also

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owned by the grantor, lying directly south of lot No. 2 and abutting on the road), opposite the southeast corner of lot number one on the east side of Bloomingdale road, and running thence north * * * along the road aforesaid to the land of James DePeyster," and the description, after giving other courses and distances, concluded, "thence north * * * along lot number four to the road and place of beginning."

The Bloomingdale road having been discontinued by statute, rival claims were presented upon the part of the heirs of the original owner and by persons claiming under his grantee, to an award, made by commissioners, to unknown owners of the land between the lots Nos. 1 and 2 in the road and which had been taken for the public use.

Held, that in view of the rule that where land is described as running to, and thence along, a road, whose fee is vested in the grantor, the center of the road is the boundary of the land conveyed, the persons claiming under the grantee in this case were entitled to the whole of the award, as the original grantor had conveyed the lands lying on both sides of the road and had not reserved the roadway; and that the fact that he had, in the deed, referred to a map which he had caused to be made of his lands, and which showed the road, did not prevent its bed from passing by the grant;

That the words "on the east side of Bloomingdale road," following the phrase "opposite the southeast corner of lot number one" in the description of lot No. 2, were not to be regarded as applying to lot No. 1, but merely as conveying a general description of lot No. 4;

That an order, directing the payment of an award made for lands taken for public use, should not contain a direction that the award be paid to the parties entitled thereto, or to their attorneys, as where such a payment is to be made to any one other than the owner of the fee, the payee should be required to present to the city officer making the payment a power of attorney duly executed and acknowledged by the person entitled thereto.

APPEAL by the petitioners, Henry T. Carey, as trustee, etc., of George De Peyster, and others, from so much of an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 14th day of July, 1896, as confirms the report of a referee, and overrules the exception filed to said report by said appellants, being the heirs of Nicholas De Peyster, and denies the motion made on behalf of said appellants that the whole amount of said award be paid to them, and from so much of said order as confirms the said report and directs the payment of a portion of said award to Hermann C. von Post and others, as the heirs of William Whitlock, deceased, and from so much of said order as directs the payment to John Metcalfe and others, of the balance of the said fund.

Also an appeal by Hermann C. von Post and others from the whole of said order.

The order directed the distribution of an award to unknown owners of land taken in the proceedings.

James A. Deering, for the petitioners, appellants.

Bache McE. Whitlock, for the other contestants, appellants.

INGRAHAM, J. :

This proceeding was instituted to acquire the title to certain land necessary for the Cathedral parkway in the city of New York, pursuant to chapter 275 of the Laws of 1891. The commissioners in that proceeding made an award for lots numbered 130, 131 and 134 upon the damage map annexed to the report to unknown owners, and this application was to obtain such award. The court below directed the payment to the petitioners of the whole amount awarded for lot No. 134, and one-half of the amount awarded for lots Nos. 130 and 131. Both the petitioners and the contestants appeal from such order.

The property included within the bounds of the said lots had been used for many years as a part of Bloomingdale road, which highway had been discontinued in pursuance of section 3 of chapter 697 of the Laws of 1867. That act provided that all streets, avenues, roads, public squares and places within the district mentioned in the 1st section of the act, and which should not be shown or retained on the maps to be filed by the commissioners as thereinbefore required, should from and after the time of the filing of the said maps cease to be or remain public streets, avenues, roads, squares or places ; "and the abutting owners on such of said streets, avenues and roads as have been opened or ceded, and as shall be abandoned or closed under the provisions of this act, shall become and be seized in fee simple absolute therein, to the center line thereof in front of his or their lands respectively." The contestants in this proceeding are the owners of the land abutting on that part of the Bloomingdale road which included the lots mentioned, and in them vested, by virtue of this act, all the interests of the People of the State, or that was owned by the city of New York as trustee for the People

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of the State, or for public use in and to the land in question; and at the time of the institution of such proceedings such land was in actual possession of the contestants.

The first question involved in this case is as to the ownership of the fee of this land. The title of both parties is derived from Nicholas De Peyster, who, it is conceded, owned the fee of this road and who conveyed the land on both sides of the road to one Mumford by a deed dated November 2, 1801, which was recorded August 29, 1804, the petitioners claiming as De Peyster's devisees and the contestants claiming as grantees of Mumford, and insisting that the fee of the road passed to Mumford by De Peyster's deed before mentioned. The only question involved is as to the right to these awards. It must be assumed that the amount awarded is the value of the property itself as taken by the city for the use mentioned, and that the award must have been made for the interests of the owners of that property, the sole question before the court being to determine who the unknown owner of this land was; and when he is ascertained he is entitled to the money as if he had been known and the award had been made to him personally. (*In the Matter of Dept. of Parks*, 73 N. Y. 565.)

Nicholas De Peyster, prior to the execution of this deed, was the owner of a large tract of land amounting to upwards of 137 acres through which ran the Bloomingdale road. He caused a map of this plot to be made, on which the land in question was divided into four lots, the easterly boundary line of lot No. 1 and the westerly line of lot No. 2 being the Bloomingdale road, and the land in question was a portion of this road between these two lots. By the deed of November 2, 1801, before mentioned, Nicholas De Peyster and wife conveyed lots Nos. 1 and 2 upon said map to Mumford.

The description of lot No. 1 on the west side of Bloomingdale road is as follows: "Beginning at the northwest corner of lot number three; thence north * * * along the North river," by various metes and bounds, to the northerly boundary of the lot; "thence south sixty-one degrees east, six chains and sixty links along land of the said Nicholas De Peyster to the road or highway (being the Bloomingdale road aforesaid); thence south nine degrees west eight chains and four links along the road to lot number three;" thence

north to the river and place of beginning, containing five acres and forty-two hundredths of an acre.

The description of lot No. 2 is as follows: "Beginning at the northwest corner of lot number four opposite the southeast corner of lot number one on the east side of Bloomingdale road, and running thence north, nine degrees east, seven chains and eleven links along the road aforesaid to the land of James De Peyster; thence south eighty-one degrees east along the said land and land of James De Peyster, eighteen chains and twenty-two links; thence south sixteen degrees west, along land of the said James De Peyster, nine chains and thirty links, to the northeast corner of lot number four; thence north seventy-six degrees west, sixteen chains and sixty-seven links along lot number four to the road and place of beginning, containing fourteen acres and eleven-hundredths of an acre." The referee held that De Peyster did not by this deed part with the fee of the land in the road adjoining the tracts therein described; and the correctness of this decision is challenged by the contestants.

It is clear that, if the learned referee erred in his construction of these deeds so that the fee of Bloomingdale road upon which the lots abutted was conveyed to the grantee, the contestants are entitled to the whole of this award. In the damage map annexed to the commissioners' report, the strip of land embraced in Bloomingdale road is divided in the center, and lots Nos. 131 and 134 appear to be included in the westerly half of Bloomingdale road. Lot No. 130 is included in the easterly half of Bloomingdale road. These two lots are separately described, and the deed of De Peyster to Mumford conveys "those two certain lots, pieces or parcels of land situate, lying and being at Bloomingdale in the Seventh ward of the city of New York, aforesaid, and distinguished on a map or chart of four tracts of land on both sides of Bloomingdale road, lately made by Evert Bancker, junior, by lots number one and two." Lot No. 1 commences on the northwest corner of lot No. 3, being thus the southwest corner of the lot conveyed. That lot is bounded on the west by the Hudson river, and it commences, therefore, at the Hudson river on the boundary line between lots Nos. 1 and 3. The boundary of lot No. 1 runs thence along the river north to the northerly side of lot No. 1; thence south along the side of lot No. 1 to the road or highway, being the Bloomingdale road in question;

thence along the road to lot No. 3, and thence north to the river, the place of beginning.

Now, it is entirely clear that if this description stood alone it would include the fee of the westerly half of the road adjoining these premises. I know of no case that questions the proposition that when land is described as running to a road, and thence along the road, the boundary of the land conveyed is the center of the road, the fee of the road being vested in the grantor. This rule has been recognized from a very early time in England to the present time. (*Wagner v. Troy Union R. R. Co.*, 25 N. Y. 529; *Matter of Ladue*, 118 id. 219.) And in *Holloway v. Southmayd* (139 N. Y. 400) Judge GRAY, in delivering the opinion of the court, says: "There is no doubt about the rule being settled that there is a legal presumption against the grantor's intending to reserve to himself the title to the soil of the highway, and that such presumption is only overcome by language in the conveyance clearly indicating such an intention on his part." In *White's Bank of Buffalo v. Nichols* (64 N. Y. 71) Judge ALLEN, in delivering the opinion of the court, says: "Although the highway is in one sense a monument, it is regarded as a line, and the center of the highway in such case is regarded as the true boundary indicated, as is the case when a tree, stone or other similar object is designated as a monument; the center, in the absence of any other indication, is regarded as giving the true boundary or limit of the grant." We have in this description the Bloomingdale road as the boundary of lot No. 1. The lot conveyed runs to the road or highway. No monument, except the road, is mentioned as the easterly boundary of the lot. The lot is not bounded by the side of the road, nor are any terms used which would indicate an intention of the grantor to limit the land conveyed to the side or edge of the road, as appears in each of the cases cited in which the bed of the road has been excluded. In all such cases the fee of the bed of the road has been held not to pass, because by express language used in the grant the intention to exclude the highway was apparent; and in each of the cases cited the general rule is recognized. In *Jackson v. Hathaway* (15 Johns. 454) the court say: "Where a farm is bounded *along a highway, or upon a highway, or running to a highway*, there is reason

to intend that the parties meant the middle of the highway." Thus, by this description of lot No. 1 the fee of the westerly half of the roadway vested in the grantee.

We think also that the conveyance of lot No. 2 carries the fee of the east half of the roadway. That lot is described as "beginning at the northwest corner of lot number four, opposite the southeast corner of lot number one on the east side of Bloomingdale Road." The evidence here is clear that the grantor owned the fee of the Bloomingdale road, abutting on lots Nos. 1, 2, 3 and 4. He had by deed conveyed to the grantee the westerly half of the Bloomingdale road, abutting upon lot No. 1. The northwest corner of lot No. 4, confining the description of the lot to a mere reference to the map, would include the fee of the easterly half of the Bloomingdale road, upon which that lot abutted, as we have here proof of the fact, the absence of which Judge GRAY commented upon in the case of *Holloway v. Southmayd* (*supra*), that the grantor did own to the center of the road. If we accept, therefore, the northwest boundary of lot No. 4 as the point from which the description of this lot runs, that point would be in this case fixed as the center of the road. The lot conveyed is also described as being "opposite the southeast corner of lot number one, on the east side of Bloomingdale Road." If these words, "on the east side of Bloomingdale Road," should be construed to apply to lot No. 1, as the punctuation would seem to indicate, there was an evident mistake, because lot No. 1 is not on the east side, but on the west side of the road. Taking the whole description together, it would appear that the words "on the east side of Bloomingdale Road" were intended to convey a general description of lot No. 4, rather than of lot No. 1 or No. 2, and to indicate that lot as being a lot on the east side of the road. By transposing those words, so that the description would read, "Beginning at the northwest corner of lot No. 4, on the east side of Bloomingdale Road, and opposite the southeast corner of lot No. 1, and running thence along the road," would seem to be the description that was intended. This would manifestly refer, not to the northeast corner, which was on the east side of the road, but to the lot itself as being so situated. The lot thence ran along the road, not along the side of the road, a description which would clearly indicate an intention to convey to the center of the road,

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rather than to limit the grant to the easterly side; and then being carried by various metes and bounds to the northeast corner of lot No. 4, the description runs, thence along lot No. 4 to the road and place of beginning, again making the road the boundary of the lot, rather than the side of the road.

We must also consider the fact that, by this deed, the grantor conveyed the land upon both sides of this road. There is nothing to show any intention or necessity of reserving the fee of the roadway. He had parted with the land upon both sides of the road by one deed, and the west half of the road went without there being any language in the deed to indicate an intention to retain any interest in the east half of the road abutting on the property granted, and without expressly bounding either plot by the side of the road, but in both cases using the road itself as the actual boundary of each separate plot. The reference in the deed to the plan or map of the lots does not indicate an intention to exclude the bed of the road. The rule is well settled that "It is not sufficient to exclude from the operation of the grant the soil of a highway, *usque ad medium filum*, that the grant is made with reference to a plan annexed, the measuring or coloring of which would exclude it, or by lines and measurements which would only bring the premises to the exterior line of the highway, or that they are bounded generally by the line of the highway, or along the highway, or by any similar expressions." (*White's Bank of Buffalo v. Nichols, supra.*)

We have, therefore, come to the conclusion that, by this conveyance, the fee of the Bloomingdale road, upon which lots Nos. 1 and 2 abut, was conveyed to the grantee, was vested in the claimants, and that the petitioner is not entitled to any portion of this award made to unknown owners. The order appealed from should be modified by directing that the award should be paid to the claimants.

The order entered contains a provision that the payment of this award shall be made either to the parties entitled to it, or to their attorneys. We think, in such a proceeding as this, where the money which stands in the place of land taken for a public use is in the hands of the chamberlain, that such a provision in the order is improper. To authorize its payment by the chamberlain to any person other than to the owner of the fee of the land taken, we think there should be a power of attorney, acknowledged as is

required, to entitle a conveyance of real property to be recorded, so that there should be a public record of the receipt of the money which would be proof that all of the steps necessary to vest the public with the property taken had been completed.

The order as modified, as herein directed, is affirmed, without costs.

VAN BRUNT, P. J., RUMSEY, WILLIAMS and PARKER, JJ., concurred.

Order modified as directed in opinion, and affirmed as modified, without costs.

In the Matter of the Application of EDWIN V. WELCH for the Appointment of a Trustee in the Place of HENRY A. BASSFORD, Deceased, under a Trust Deed Executed by VIRGINIA L. WELCH to HENRY A. BASSFORD, dated October 20, 1884.

EDWIN V. WELCH and GEORGE F. ELLIOTT, as Trustees, etc., Appellants; BESSIE V. REINISCH and Others, Respondents.

Trusts—remaindermen are entitled to notice of an application for the appointment of a new trustee of an express trust which has vested in the court—notice, how given.

Under section 91 of the Real Property Law (Laws of 1896, chap. 547), providing in substance that an express trust shall, upon the death of its surviving trustee, vest in the Supreme Court and be executed by its appointee, "who shall not be appointed until the beneficiary thereof shall have been brought into court by such notice, in such manner as the court or a justice thereof may direct," remaindermen are entitled to notice of an application for such appointment, and an *ex parte* order, appointing a trustee solely upon the application of the life beneficiary, should be vacated where the trustee thus appointed bears such a relation to the life tenant as may, under the circumstances existing in the particular case, prejudice the interests of the remaindermen.

The notice to be given, and the method of giving it, rest in the discretion of the court, and if notice can be given, even out of the jurisdiction, want of notice should not be encouraged.

APPEAL by the petitioners, Edwin V. Welch and another, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New

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York on the 6th day of May, 1897, vacating an order entered in said clerk's office on the 29th day of March, 1897, appointing George F. Elliott as trustee of the estate created by the deed of Virginia L. Welch, under date of October 20, 1884, in the place of Henry A. Bassford, deceased.

Henry M. Dater, for the appellants.

Frederick F. Neuman, for the respondents.

INGRAHAM, J. :

By a trust deed executed on the 20th day of October, 1884, and recorded in the office of the register of the county of New York on the 2d day of November, 1884, Virginia L. Welch conveyed certain real estate within this county to one Henry A. Bassford in trust, to collect the rents, issues and profits of such real estate, and pay over the income thereof to one Edwin V. Welch during his life, and upon his death the said trust estate was to become the property of the children of the said Edwin V. Welch and Elizabeth J. Murray. Edwin V. Welch is still alive, but on the 19th day of February, 1897, Henry A. Bassford, the trustee named in such trust deed, died. On the 29th day of March, 1897, upon the application of Edwin V. Welch, who was entitled to the rents, issues and profits during his life, and without notice to the remainderman, or others interested in the trust, the court, by an *ex parte* order, appointed one George F. Elliott "trustee in the place of the said Bassford." A copy of this order is not annexed to the papers, or a part of the record before us. It is conceded, however, that the order was entered *ex parte*, without notice to any one interested in the trust, except the petitioner who was the life tenant. By those entitled to the remainder in the property after the death of Edwin V. Welch, a motion was made to vacate that order, so that the remaindermen could be heard upon the appointment of the new or substituted trustee. Upon that motion coming on to be heard, Edwin V. Welch, the life tenant, and Elliott alone opposing, the *ex parte* order of the twenty-ninth of March was vacated and set aside, and from the order vacating such order of the 29th of March, 1897, Edwin V. Welch, the life tenant, and said Elliott appeal.

By section 91 of the Real Property Law (Laws of 1896, chap.

547) it is provided that, "on the death of the last surviving or sole trustee of an express trust, the trust estate shall not descend to his heirs nor pass to his next of kin or personal representatives, but in the absence of a contrary direction on the part of the person creating the same, such trust, if unexecuted, shall vest in the Supreme Court, with all the powers and duties of the original trustee, and shall be executed by some person appointed for that purpose under the direction of the court, who shall not be appointed until the beneficiary thereof shall have been brought into court by such notice in such manner as the court or a justice thereof may direct."

The evident intent of this provision is that those interested in the execution of a trust should have notice of an application to appoint a person to execute the trust, so that they could be heard as to the individual to be selected by the court under the power given in this section of the statute. Whether the term "beneficiary thereof" would include all of those contingently interested in the execution of the trust, it is not necessary now to determine; but it seems clear that a person in whom is vested a remainder in real property, and whose rights may be most seriously affected by the execution of a trust which has vested in the court, is a beneficiary of the trust, within the provisions of this statute. A trustee in whom is vested real estate held in trust for a person during life has certain duties as to the *corpus* of the estate for the protection of the remaindermen. It is his duty to see that the taxes and other charges are paid; that the estate is kept in repair, waste prevented, and the condition of the estate as it came into his hands protected. To such extent, at least, the trustee occupies a trust relation to the remaindermen, and, independent of the statute, we think that it would be proper for the court, before it should make any order as to the method of executing the trust, or designate any person to execute it, to give the remaindermen an opportunity to be heard. Even if we assume that the court had the power to make this order without such notice, it clearly had the power to vacate the order upon the application of any one interested in the estate who had not had notice of the original application, so as to give such person an opportunity to be heard as to either the method of executing the trust or the person designated to execute it. There can be no doubt of the power of the court over a person thus appointed, who is an officer of the court

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selected to execute the trust which has vested in the court; and no one interested in such a trust has the right to require that the court should select any particular individual to execute the trust on its behalf. Just what notice of the application should be given to a beneficiary and how given must be in the discretion of the court. If notice can be given, even if out of the jurisdiction, want of notice should not be encouraged. There are many cases where an individual may be so intimately connected with the person entitled to the income of the trust during his life that it would be improper, against the objection of those interested, to appoint him the trustee or the one to execute the trust vested in the court. Where such an objection appears, the court is certainly justified in selecting some other person who can execute the trust in such a way that the interest of the remaindermen shall be considered.

The facts in this case show, from the affidavit of Mr. Elliott, that he has been in the employ of the person entitled to the income of the trust for life and was appointed at his suggestion. It also appears that, in addition to the real estate which was conveyed to the trustee, there is a sum of money now in the hands of the executor of the deceased trustee which constitutes a portion of the trust estate, being the proceeds of real estate sold for the former trustee; and it appears that there is to be a contest between the remaindermen and the person entitled to the income of the trust estate for life as to the administration of the trust. Under those circumstances it would be quite improper that a person occupying the relation that Mr. Elliott occupies towards the person entitled to the life interest should be the person designated to execute the trust.

We think, therefore, that, upon these facts appearing to the court below, it was the duty of the court to vacate its order appointing Mr. Elliott, and the order appealed from is affirmed, with ten dollars costs and disbursements.

VAN BRUNT, P. J., RUMSEY and PARKER, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements.

In the Matter of the Application of BESSIE V. REINISCH and GRACE E. WELCH, for the Appointment of a Trustee in the Place of HENRY A. BASSFORD, Deceased, under a Deed of Trust Dated the 20th Day of October, 1884, between VIRGINIA L. WELCH and HENRY A. BASSFORD.

EDWIN V. WELCH and GEORGE F. ELLIOTT, as Trustees, etc., Appellants; BESSIE V. REINISCH and GRACE E. WELCH, Respondents.

Trusts—appointment of a new trustee of an express trust—notice to remaindermen—rights of remaindermen not within the State.

Upon the death of the sole trustee of an express trust the court has power, under section 91 of the Real Property Law (Chap. 547, Laws of 1896), to appoint a successor upon notice to the actual beneficiary and also to the remaindermen; and if any of the latter, having an interest, are without the jurisdiction of the court and cannot be served with notice, they may apply to the court for protection.

APPEAL by Edwin V. Welch and another from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 6th day of May, 1897, appointing a trustee to execute a trust under a deed of trust bearing date October 20, 1884, between Virginia L. Welch and Henry A. Bassford, in the place of Henry A. Bassford, deceased.

Henry M. Dater, for the appellants.

Frederick F. Neuman, for the respondents.

INGRAHAM, J. :

The court in this case appointed a person to execute a trust vested in the Supreme Court by the death of the trustee named in the instrument creating the trust.

We have held in *The Matter of the Application of Edwin V. Welch* (*ante*, p. 412), decided herewith, that the court below properly vacated the order theretofore entered *ex parte*, appointing one George F. Elliott as substituted trustee in place of the deceased trustee. When this order was entered, therefore, the order appointing Elliott having been vacated, there was no person appointed to execute this trust as the representative of the court, the former trustee being dead, and the appointment of Elliott having fallen by the vacation of the order appointing him. The court clearly had the power under the

statute to designate a person to execute the trust vested in it upon the death of the sole trustee. We think the court had the power to and should hear the remaindermen upon the appointment of the person who was to execute the trust. No reason is suggested why the gentleman appointed by the court below is not an entirely competent person to execute the trust.

There is nothing in the affidavit of Henry M. Dater in opposition to this motion which prevented the court from making this order. The deed creating the trust is not before the court, and we are unable to say just who were entitled to the remainder after the death of the person entitled to the income for his life. All that we have is the allegation of the petition that by the deed creating the trust, it was provided that the rents, issues and profits were for "the support and maintenance of Edwin V. Welch, the father of the petitioners, during his life, and upon his death to apply the same to the support of his wife and children, if there be any of them surviving him, during the life of the said Virginia L. Welch, and at the death of the said Edwin V. Welch, in case the said Virginia L. Welch should not be living, then to divide the said lots in equal shares among the children and descendants of children, *per stirpes*, of the said Edwin V. Welch then surviving;" that the said Virginia L. Welch is dead, and that the said Edwin V. Welch, her son, is still alive and has children, the two petitioners and one Sidney L. Welch, who is twelve years of age, and George R. Welch, who is sixteen years of age.

In the affidavit of Henry M. Dater it is stated that the said Edwin V. Welch was remarried after his divorce from the mother of the petitioners, and has children living who reside with the said Edwin V. Welch in the State of Ohio. Upon the papers presented upon this appeal we cannot say that the children of the said Edwin V. Welch residing in Ohio are interested in this trust property. They are, none of them, alleged to be within the jurisdiction of the court, nor can service be made upon them. If they have an interest in this trust property they can apply to the court for protection.

The order appealed from is, therefore, affirmed, with ten dollars costs and disbursements.

VAN BRUNT, P. J., RUMSEY and PARKER, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements.

G. BYRON LATIMER and IRVING SAVINGS INSTITUTION, Respondents,
v. JAMES M. VEADER, as Executor, etc., of WILLIAM H. BUXTON,
Deceased, Appellant, Impleaded with Others.

Agreement to indemnify a bank for thefts of its secretary — when “indebtedness” covers his own thefts and those of his subordinates occurring by his connivance or negligence — parol evidence as to the meaning of the agreement — interest.

Upon the discovery of thefts committed by the secretary of a savings bank, both while holding that office and previously while acting as one of the clerks of the bank, and of thefts by other of its employees, subordinate to him and which occurred through his connivance or negligence, the secretary of the savings bank gave to a third person, for its benefit, an agreement made part of, and at the same time with, a mortgage executed by him to secure its obligations, which agreement, after stating that he was indebted to the bank in an amount uncertain, but to be ascertained by investigation within twelve months, contained a condition that if any “indebtedness” from him to the bank should be found to exist, he would pay it with lawful interest, or, in the alternative, that the mortgage should be availed of.

Held, that proof that, at an interview had between him and the bank officials and which led to the execution of the instruments in question, he, after having been charged with being liable for the whole deficiency, a sum much greater than that which he was willing to admit, finally agreed to make good any deficiency for which he was responsible “directly or indirectly,” was admissible; That the bank was entitled to recover, upon a foreclosure of the mortgage, under the word “indebtedness” and upon proper proof, not only the personal debt of the secretary to it, but also the sum taken from it, with his connivance or through his negligence, by the clerks who were subordinate to him, together with lawful interest thereon from the time when his obligation to the bank accrued.

APPEAL by the defendant, James M. Veader, as executor, etc., of William H. Buxton, deceased, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 26th day of June, 1896, upon the decision of the court rendered after a trial at the New York Special Term.

Robert Hunter McGrath, Jr., Frederick A. Camp and Daniel G. Rollins, for the appellant.

Charles E. Rushmore, for the respondents.

INGRAHAM, J. :

This action was brought to foreclose a mortgage made by one William H. Buxton, the appellant’s testator, to one Bainbridge Colby, and

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assigned by said Colby to the plaintiff Latimer, and was given to secure the performance of the covenants and conditions of a certain agreement bearing even date with the mortgage, viz., May 4, 1893. The condition of the mortgage was, "Provided always that if the said party of the first part, his heirs, executors or administrators, shall faithfully do and perform all the covenants and conditions of the said agreement hereinbefore referred to on his part to be performed that then these presents and the estate hereby granted shall cease, terminate and be void," followed by a covenant of the mortgagor that he "will faithfully perform each and every of the covenants and conditions of the said agreement with the said party of the second part by the party of the first part to be performed and pay any and all sums of money therein referred to." The agreement described in the mortgage provides that whereas the said Buxton "is and for sometime past has been the secretary of the Irving Savings Institution, a corporation organized under the laws of the State of New York, and it is claimed by the said institution, or some of the officers thereof, that said party of the first part is indebted to it for a large amount of money, which indebtedness, if any, was created under circumstances not herein set forth, but which may be shown if this agreement is ever sued upon in a court of law or equity; and whereas, the exact amount of such indebtedness, if any, has not been yet determined, but is about to be investigated and fixed, and if any be found to exist said party of the first part is to pay the same, and in the meantime desires and has agreed to secure the payment thereof by mortgage upon certain real estate owned by him; and whereas, the said savings institution has appointed the party of the second part to act for and to represent it in this agreement, and the party of the first part hereby recognizes the party of the second part in such capacity; now, therefore, in consideration of the premises and of the sum of one dollar to him in hand paid and of other good and valuable considerations, receipt whereof is hereby acknowledged, the party of the first part covenants and agrees to and with the party of the second part as follows: *First.* That if after an examination and investigation of his accounts and dealings with said Irving Savings Institution, there shall be found to be any indebtedness from said party of the first part to said institution, he will pay the same with lawful interest thereon

on demand. *Second.* That the said institution shall have twelve months from the date hereof within which to complete such examination and investigation. *Third.* The party of the first part coteremporaneously with the execution of this agreement having executed and delivered to the party of the second part a mortgage upon certain real estate owned by him to secure the payment of whatever sum of money may be found to be due from said party of the first part to said institution as aforesaid, with the lawful interest thereon and the faithful performance of the covenants and conditions herein contained ; now, therefore, in the event that he shall fail to pay such indebtedness with the interest thereon as aforesaid, the party of the second part may avail himself at once of the said mortgage for the purpose of realizing for the said institution the amount of such indebtedness with interest and costs and expenses ; if, however, upon the expiration of said period of twelve months above provided, no indebtedness from the party of the first part to said savings institution shall be found to exist, then the party of the second part shall cancel the said mortgage of record."

The complaint alleges the execution of the mortgage and agreement, and that, upon an examination and investigation of the accounts and dealings of said defendant William H. Buxton with said plaintiff, Irving Savings Institution, it appeared that said Buxton was indebted to the said institution in the sum of \$32,919.57, with interest. The answer of the defendant denies his indebtedness to the savings institution in any sum whatever, and the issue raised by this denial is the first question presented upon this appeal.

It appears that the defendant entered into the employ of the savings institution in the year 1863 as a clerk. That subsequently there were in the employ of the said institution two clerks, of whom the defendant was one, whose duty it was to receive money from depositors and pay it out to them. He continued to act in that capacity until the year 1890, when he was made secretary, in which position he continued down to the time of the execution of the mortgage and agreement before referred to. These two clerks were known as first and second clerks. The first clerk was generally employed as paying teller, and the second clerk as receiving teller of the bank, although each of the clerks from time to time performed the duties of the other. One Daniel D. Tompkins was the

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other clerk in the employ of the institution, from a period in 1873 down to May 4, 1893, the date of the mortgage and agreement in question. During all that time he was subordinate to the mortgagor, and when the mortgagor became secretary, Tompkins became first clerk or paying teller. During the time, however, that Buxton was secretary, he also performed duties at the paying teller's and receiving teller's desks, in the way of paying out and receiving moneys. At the time Buxton became secretary, one Heaten was president of the institution, and Heaten's son then became the second clerk. About the year 1883 Tompkins commenced to have access to the cash of the bank, and from that time down it seems that all four of these officials from time to time appropriated the money of the bank to their own use. Some small appropriations it seems had been made prior to that time and as far back as the year 1876, and these were accomplished by taking money from the bank and substituting in place of it tickets which would represent the money taken and which were counted in as cash. The books of the bank were balanced by treating the amounts specified in these tickets as so much cash on hand. There is some doubt about the time that Buxton commenced this method of appropriating the funds of the bank, but it seems that from 1876 down, there existed always more or less of a defalcation by these officers. At the examinations of the bank by the Banking Department of the State, various means were used to cover up these defalcations. Tompkins testified that at one time Buxton called his attention to a ticket for \$600 which he had in the drawer, and told him (Tompkins) that he must get it out of the drawer, when Tompkins said, "I haven't got the money." Buxton said, "Charge it up to your wife's account." Tompkins did so. It seems that each of these parties had accounts with the bank in the name of their relatives, or others, whose accounts were used for the purpose of covering up the defalcations, Tompkins having an account with his wife in her name before she was married, and also in the name of C. H. Fitch, C. M. Fitch, C. Mitchell and the Anchor Lodge, and also an account in his own name. Buxton had two accounts which he used to cover up his defalcations, viz., Sarah R. Buxton and Leila M. Buxton, and it is to these accounts that most of the amounts appropriated by these two parties were charged. The appropriation of these moneys was concealed by either failing

to charge the accounts with the moneys appropriated; by keeping some of the accounts in the old books of the bank; by not transferring them to new ledgers when opened, or by not posting the particular accounts which appeared upon the depositors' ledger largely overdrawn in the general ledger of the institution. It also appears that prior to the year 1893 the examination of these banks by the department and the officers had been confined to an examination of the general ledgers, the depositors' ledger not having been examined by either the examiners of the department or the trustees of the bank, and thus the defalcation had escaped detection. When, however, an examination was commenced about May 1, 1893, by the officers of the Superintendent of Banking, a new system was adopted by which the depositors' ledger was examined, and then the defalcations were at once discovered. At first the only discovery that was made was the condition of the two accounts used by Buxton, and he was charged with having appropriated the money of the bank. He at once admitted the charge, claimed that he had appropriated about \$25,000 of the bank's money, and made restitution to the bank of that amount. Tompkins, at that time, was absent from the bank on account of sickness, and there was no knowledge by the officers of the bank or the superintendent as to his defalcations. Buxton at once paid to the bank \$25,000, which he claimed was the total amount appropriated by him. Subsequent to such repayment to the bank, Mr. Simon H. Stern was called in as legal adviser, and a consultation was held at the office of the bank, at which were present Buxton, Mr. Fancher, who was one of the trustees, Mr. Stern, the president of the bank, the Superintendent of Banking, and possibly some others. It had then been discovered that there was upwards of \$60,000 to be accounted for, and Buxton was charged with being responsible for this full amount. He, however, denied strenuously that any sum had been taken by him over and above the sum mentioned and which he had restored to the bank, and claimed that the apparent deficiency was the result of mistakes or errors in the accounts, and that upon an examination of the books it would appear that the amount which he conceded had been due from himself and which he had restored was the full amount of the loss to the bank. Mr. Stern and the bank officers, however, insisted that he was responsible to the bank for

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the whole amount of the deficit, the information, however, then at their disposal not enabling them to fix definitely either the amount or the nature of the deficit. It was first insisted that he should deposit with the bank a sum of money sufficient to make up the deficit, to be returned to him in case it was found that his statement was correct. This he stated he was unable to do, and that it was impossible for him to procure such a sum of money. He offered, however, to give to the bank security. The terms of that offer were disputed. Mr. Fancher, who appears to have acted for the bank, testified that at this conference on the afternoon of May 4, 1893, "Mr. Buxton was told that there was a discrepancy found against him of about twenty odd or twenty-two or twenty-three thousand dollars; and he admitted that there was about \$25,000 chargeable to him; in other words, that he had taken, and said that he had raised the money and would make that good. Mr. Heaten (the president) was there at the time, and I asked him if that was so, and he stated that it was; that he had the money in the safe to pay the bank and the examiners for the deficiency." The bank examiners had found that the total deficiency was upwards of \$60,000, and that fact was communicated to Buxton. Mr. Stern then said to Buxton, "Now, Mr. Buxton, we have not finished this examination, and we have no means of knowing whether your statement is true or not, and you should make some other provision for the payment of what you may be responsible for." Buxton said, "I am perfectly willing to do that." Mr. Stern also said to him in that connection, "You are able to make this payment and you are really the only responsible man here financially." Buxton made reply, "I am willing to make good anything that I am responsible for." Mr. Stern said to him, "Directly or indirectly responsible?" and he said, "Yes, directly or indirectly." Subsequently the parties met at the office of Mr. Stern, at which time the mortgage and collateral security were executed. Mr. Stern's testimony corroborated Mr. Fancher as to this interview, he stating that he said to Buxton, "I am informed that there has been \$60,000 stolen from this bank, and that you are responsible for it." In reply to that Buxton said, "I haven't taken but a certain amount," mentioning twenty or twenty-two or twenty-three or twenty-five thousand dollars; he said, "I have paid that back." Buxton insisted at this interview that he had taken

but \$25,000; that nobody had stolen any more, and that the balance of the deficiency had been occasioned by errors and mistakes in the bank. Mr. Stern testified that Buxton further said that he was perfectly willing to give the bank security for anything that he might be responsible for. Mr. Stern then said to him, "Directly or indirectly?" to which he replied, "Yes." At Buxton's request Mr. Stern drew up this agreement so that it would not disclose the actual state of affairs, and Mr. Stern assented to that because he (Buxton) assured him that there was no necessity for that, as it would be found on examination that only \$25,000 had been stolen. "That is all, and every dollar of that balance you will find is nothing but errors and carried for many years." Mr. Stern further testified that he told Buxton that he (Stern) believed that Buxton had taken all and more; that he believed that he would be found to be responsible for the whole business, and insisted upon security being given. Buxton in his testimony denied having made any promise to secure the bank for any amount for which he was responsible, directly or indirectly; alleged that no claim was made that he was responsible for anything except the money that he had actually taken; and there was testimony of others present at this interview which corroborated Buxton's statement.

The first and serious question presented upon this testimony is as to the construction to be given to these instruments, whether there was secured by this mortgage any amount for which Buxton was liable to the bank, which either through his connivance or negligence had been taken by other employees of the bank. Subsequent investigations show that, in addition to the \$25,000 which Buxton had repaid to the bank, there was due by him the sum of \$4,333.80, which on May 7, 1894, he repaid to the bank. It also appeared that Tompkins had appropriated \$23,702.17; and that Heaten, the other clerk, had appropriated \$729.95; making a total of principal of \$24,432.12. For this sum, with interest, the court has awarded judgment, upon the ground that Buxton was responsible to the bank for the money thus appropriated by Tompkins and Heaten, the sum having been taken with his connivance or through his culpable negligence. And the question is whether, according to the terms of this mortgage, it covered a liability to the bank occasioned by Buxton's negligence or liability for money taken by others.

This agreement was, by the terms of the mortgage, made a part of it, and the condition of the mortgage was that the same should be void if Buxton performed all the covenants and conditions of the said agreement, and should pay any and all sums of money therein referred to. The amount due upon the mortgage must, therefore, be determined by the obligation assumed by Buxton under the agreement. The agreement recites the fact that Buxton had been the secretary of the institution; that it was claimed by the said institution or some of the officers thereof that Buxton was indebted to it in a large amount of money, which indebtedness, if any, was created under circumstances not therein set forth; that the amount of such indebtedness, if any, had not been ascertained, but if any were found to exist, Buxton was to pay the same (that is, such indebtedness); and that, therefore, Buxton agreed that if, after an examination and investigation of his accounts and dealings with such institution, there should be found to exist any indebtedness from him to the institution, he would pay the same with lawful interest thereon on demand; with a further covenant that in the event that he should fail to pay such indebtedness, with interest thereon, as aforesaid, the mortgage should be available at once for the purpose of realizing for the institution the amount of such indebtedness, with interest, costs and expenses. This was the obligation assumed by Buxton which was secured by the mortgage. The claim by the institution was that Buxton was indebted to it in a large sum of money, and Buxton's obligation was that he would pay any indebtedness that should be found to exist in favor of the institution, with lawful interest.

Was a liability for the amount taken by Tompkins and Heaten an indebtedness of Buxton's to the institution? Using it in its strict legal significance, the word "indebtedness" applies only to an obligation arising from contracts express or implied; and the defendant strenuously insists that this obligation should be confined to a liability of this character. The word "indebtedness" is defined by Bouvier's Law Dictionary as the state of being in debt without regard to the ability or inability to pay the same. The word "debt" has generally been confined to a contract obligation, and is defined in Blackstone as a sum of money due by certain and express agreement. In the American and English Encyclo-

pædia of Law it is said: "Ordinarily, it imports a sum of money arising upon a contract express or implied. In its more general sense, it is defined to be that which is due from one person to another, whether money, goods or services; that which one person is bound to pay or perform to another." (Vol. 5, 143.) It has been expressly held, however, that debt does not include a liability in tort. (Id. 148, 149, and cases cited in note 1 on page 149.)

In *Heacock & Lockwood v. Sherman* (14 Wend. 58) it was held, in construing the word "debt," as used in a statute making stockholders liable for demands or debts of the corporation, that damage arising upon tort is not a debt accrued within any reasonable construction of that term. There is, however, a much broader meaning given to the term than the definitions above given. Thus, in the Imperial Dictionary the word "debt" is defined as "that which is due from one person to another, whether money, goods or services; that which one person is bound to pay to or perform for another; that which one is obliged to do or suffer;" and there are many cases in which this broader significance has been applied to the term. Thus, Judge STORY, in the case of *Carver v. Braintree Manfg. Co.* (2 Story, 450), says: "It seems clear that in common parlance, as well as in law, the term is, in an enlarged sense, sometimes used to denote any kind of a just demand." And many other cases might be cited in which similar language is used. In which sense was the word used by the parties to this instrument in question? I think that this is a case in which the court is justified in considering the negotiations which led up to the execution of these instruments; the situation at the time the instruments were executed; the nature of the demand made upon Buxton; and the object of the parties in executing the instruments, which is apparent from what was said and done at the time they were prepared and executed. A defalcation had been discovered from which it appeared that upwards of \$60,000 had been stolen from this institution. It had been discovered that Buxton had appropriated a large portion of this money, he conceding that he had appropriated \$25,000, which he had made good. He, as the responsible officer of the institution, was charged with the responsibility for the whole amount, and the reasonable claim was made that he should account for its disappearance if he was to relieve himself from liability for

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the whole amount. He insisted that the amount that he had restored was all that had been taken, and that the apparent discrepancy was the result of mistakes or error in bookkeeping, which would be readily ascertained upon examination.

There was no evidence before the officers of this banking association that any one else had been concerned in the commission of the wrong to the company, and it is quite reasonable to suppose that if, upon an investigation, it was found that more of the funds were missing, the one who had admitted stealing \$25,000 would be the party who would be responsible for the balance. He concedes that he had knowledge of the fact that the other officers of the association had from time to time appropriated money belonging to it. He nowhere claimed that he understood that that money had been repaid. He made no statement to the officers of the institution as to the robbery of the others, but insisted that no more had been taken; and when a demand was made that he should repay this sum, or at least secure the bank against any loss if it was discovered that a further defalcation had taken place, he expressly agreed that he would accept such responsibility and would secure the bank. He stated to the officers that he was willing to make good anything that he was directly or indirectly responsible for, and it was to carry that intention into effect that the instruments were prepared and executed. He was not in a position to make terms. He must be presumed to have had a knowledge, even upon his own statements, of acts of these other employees which would at least justify any one in believing that the defalcations of his co-employees, of which he had knowledge, with his own, were not the only ones which had depleted the funds of this institution; and we agree with the learned judge below, that it is scarcely possible to conceive, considering his relations to this bank and the terms he was on with the other employees and officers, that he did not know that they had applied the same methods to cover up their stealing as had been applied by him.

It seems to us clear, considering this express intention with which Buxton executed this agreement, and the express object of the officers of the bank in obtaining this mortgage, that he must have understood that this term "indebtedness" was used in its ordinary significance, and that the agreement was intended to secure the bank

against any liability of his to the bank, in relation to this deficit which had been discovered, and which arose because of his relation to the bank. A careful examination of the whole case has convinced us that it was with this intent that the agreement was prepared, and that this meaning should be given to the language used.

In the case of *Leggett v. The Bank of Sing Sing* (24 N. Y. 284) the court had under consideration the words "debt due," and the intention with which that phrase was used, and it was there held that those words included the contingent obligation of an indorser of a promissory note held by a bank, although, at the time when the obligation was sought to be enforced, the note itself was not due, and the liability of the indorser was only contingent upon the failure of the maker of the note to pay it, and although there was a strong dissent in that case, both of the learned judges writing the opinions conceded that the words "debt due" would include an obligation that existed, although it was not payable until a future time.

It is not necessary to multiply citations to show that where one of two meanings can be given to a word used in an instrument of this character, the court should consider the object for which the instrument was executed to ascertain which of the two meanings the parties intended to use, and looking at this case, it is apparent that it was the intention of all the parties that this mortgage should be given to secure all liabilities of Buxton arising out of his connection with the defalcation of this sum, and it was not intended to restrict it to the amount to which he could be said to be indebted to the bank upon a contract or for money which he himself appropriated and used.

The other questions presented do not require an extended discussion. Upon the evidence there can be no doubt that Buxton was liable to the bank for the money appropriated by his fellow-employees. They were both his subordinates, to some extent under his control. They followed his example in appropriating the bank's money, and we think it clear from the evidence that he was negligent in allowing them to steal, and that he connived at their appropriating the money of the bank. The mere fact that he might not have been familiar with the extent of their appropriations would not relieve him from such liability.

We think it also clear that he was responsible, not only for the money that was stolen, after he became secretary, but for the money taken while he was first clerk, occupying the position analogous to that of paying teller in other institutions. The most ordinary care in the performance of his duties would have shown him not only the fact that these other employees were stealing money from the bank, but the extent of their depredations. The least of the obligations that it can be held he assumed towards his employer required that, when he had knowledge that the money of the bank was being stolen, he should have acquainted the trustees with the facts, as he would undoubtedly have done but for the fact that he himself was engaged in similar appropriations of the funds of the bank. The security of institutions of this kind must depend upon the faithfulness with which the employees discharge the duties with which they are intrusted, and the liability of faithless officers, in whom a trust is reposed, should be strictly applied to all who so neglect their duties that their employers are robbed. This is especially so when the robbery is occasioned by at least the connivance and assistance of the officer in whom the trust is reposed.

We think the amount allowed by the court below as due from the defendant was proved, and that the plaintiff was entitled to recover the interest allowed. The agreement itself provides that, for any indebtedness of the defendant, interest should be allowed, and that could only mean interest from the time that the obligation to the bank accrued.

There are many exceptions to evidence in the record, but none of them are material. The only disputed fact was as to the agreement that the defendant made as to the effect of the security that he should give. The books were in court, and the exceptions to allowing the witness to testify to their contents are not available.

We think, on the whole case, that the judgment appealed from was right, and it is affirmed, with costs.

VAN BRUNT, P. J., WILLIAMS, PATTERSON and O'BRIEN, JJ., concurred.

Judgment affirmed, with costs.

JOHN DELAHUNTY, as Receiver of the Property of GEORGE W. PROCTOR KNOTT, Respondent, v. PHILIP HAKE and Others, Appellants.

Conversion — necessity of a demand or a waiver thereof — proof of a refusal without demand made.

A party lawfully in possession of personal property, who has not attempted to dispose of it or to exercise acts of dominion over it, cannot be held liable for its conversion except upon proof of some act amounting to a conversion, and evidence of a demand is usually a necessary part of such proof.

Where a refusal to make a delivery is accepted as an equivalent for both a demand and a refusal, it must appear that the necessity for a demand was dispensed with.

The question whether a demand was made is ordinarily one of fact, and where the proof in an action for conversion is that, at a meeting of the clerks of the attorneys of the parties, held to confer concerning the respective claims of their principals to a certificate of stock, no actual specific demand was made (the whole conversation being open to the construction that it related to a prior and premature demand), it is erroneous for the court to charge the jury, in substance, that the defendants had refused to surrender the certificate and that no demand was necessary where there was a refusal in advance.

O'BRIEN, J., dissented.

APPEAL by the defendants, Philip Hake and others, from a judgment of the Supreme Court, in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 17th day of February, 1897, upon the verdict of a jury, and also from an order entered in said clerk's office on the 25th day of February, 1897, denying the defendants' motion for a new trial made upon the minutes.

George C. Lay, for the appellants.

William P. Burr, for the respondent.

PARKER, J.:

This action was brought to recover from the defendants possession of a certificate for thirty shares of stock of the Philip Hake Manufacturing Company, or, if possession could not be had, for the value thereof. The result of the trial was a judgment in favor of the plaintiff, the jury fixing the value of the stock at the sum of \$2,250.

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When this action was before this court on a former appeal (10 App. Div. 230) the judgment was reversed on the ground that there was no proof of a demand, except during the time when the defendants' possession was rightful, and hence its refusal to surrender possession did not constitute a conversion. On the retrial plaintiff attempted to supply the defect of the former trial by evidence which, it is claimed, establishes (1) that a proper demand was made by the plaintiff after December 31, 1895, and before the commencement of the action; and (2) that the defendants had refused to deliver the property, and, therefore, a demand would have been unavailing and unnecessary. Whether any error was committed by the court upon this branch of the case is the only question which will be considered on this review, and, therefore, only such facts as are pertinent to such a consideration need be referred to.

George W. Proctor Knott, of whose property the plaintiff is receiver, entered into an agreement with one Philip Hake in January, 1891, that Hake should deliver to the trustees of the Philip Hake Manufacturing Company, in escrow, a certificate for thirty shares of stock, which is now the subject of controversy, to be indorsed in blank by Knott and held by said trustees under the terms and conditions of such agreement. One of the conditions was that Knott should remain in the employment of the company until December 31, 1895, or until his death, if he should die before that time. It provided "that on the thirty-first day of December, 1895, if the party of the second part shall then remain in the employ of the said corporation, the said trustees shall be and hereby are authorized to deliver said certificates of stock to the party of the second part." At the time of the commencement of this action, and prior thereto, these defendants were the trustees of that corporation. October 21, 1895, the plaintiff was, by order of the Supreme Court, appointed receiver of all the personal property of said Knott in sequestration proceedings for the non-payment of alimony, under section 1772 of the Code of Civil Procedure. Subsequent thereto, and on October thirty-first, the receiver made a demand upon the defendants for the certificate of stock, which had been delivered to the defendant trustees in escrow, in pursuance of the agreement to which reference has been made. It will be observed that the receiver was not at that time entitled to the possession, for under the agreement the defend-

ants, as trustees, were not only entitled to, but were in duty bound to retain, possession of the certificate until the thirty-first day of December following. Not until then could it be known whether Knott would become entitled to it, for one of the conditions of the transfer of the stock was that he should continue in the employment of the company until the 31st day of December, 1895.

It is not claimed that the receiver or his representatives made a demand upon the defendants, or any of them, personally, after the 31st day of December, 1895. But it is insisted, nevertheless, that a legal demand was made upon the defendants through their attorney, to whom, the plaintiff insists, authority was given to represent the defendants in this matter, of which fact the plaintiff was advised by one of the defendants.

The foundation for this claim, briefly stated, is, that immediately after the appointment of a receiver, plaintiff's attorneys saw the defendants, and exhibited the order appointing plaintiff receiver, and asked for the stock, and were then told that the matter was in the hands of Hatch & Wickes, their attorneys. A few days later the attorneys for the plaintiff wrote the defendants about the matter, and on November thirteenth Philip Hake, in a letter to plaintiff's attorney, stated: "Your favor received. Our attorneys are Messrs. Hatch & Wickes, 35 Liberty. I have sent your letter to them, and you will please confer with them & oblige." Correspondence thereafter ensued between Messrs. Hatch & Wickes and the plaintiff's attorneys, in the course of which plaintiff's attorneys presented their understanding of the facts, and expressed the opinion that the receiver was entitled to the stock. The last letter of the series was dated January 10, 1896, and was written by Messrs. Hatch & Wickes, who therein explained the cause of delay in writing, and concluded: "If your Mr. Wilson or any representative of your office will call, Mr. Kenyon will confer with him about the same." Mr. Kenyon was an attorney connected with the firm of Hatch & Wickes. Four days later Mr. Wilson called at the office of Hatch & Wickes and had an interview with Mr. Kenyon. That interview was not before the court on the former appeal, as appears from the following extract from the opinion (10 App. Div. 232): "There was evidence on the part of one Wilson, who was in the employ of the plaintiff's attorneys as managing clerk, and who swore that he called

at the office of the defendants' attorneys in January, with regard to the payment or delivery by the trustees of the company to the plaintiff of the stock in question; but what transpired at this interview does not appear." On this trial Mr. Wilson testified that, in the interview between himself and Mr. Kenyon on January fourteenth, "I asked Mr. Kenyon whether now Hatch & Wickes would advise the Hake Company to deliver this stock to Mr. Delahunty as Receiver. He said, as I recollect, that there were assignments that had been filed with the Hake Company regarding this stock, and that, in the face of notice of those assignments, the Hake Company could not safely deliver the stock to Mr. Delahunty. I then suggested that the only way out of that predicament was for Mr. Delahunty to bring an action, wherein the trustees might interplead these various claimants, and Mr. Kenyon, as I recollect, said that he thought that would be the course to pursue."

In regard to the same interview, Mr. Kenyon testified: "Q. Mr. Wilson testified, if my recollection serves me right, that he asked if Hatch & Wickes were prepared to give up the stock. A. There was not a word of that kind said by Mr. Wilson to me, not one word. The conversation was, that we could not advise the Hake Company to surrender the stock to the receiver, for the reason that Mr. George W. Proctor Knott had not fulfilled his contract, and that the contract was assigned to his father, and the salary had been assigned to a man, to a man by the name of Strange, in Boston. I did not have, at that time, in my possession the stock. I was not authorized to deliver it. I did not have any control over it. I did not know where it was. Q. Did Mr. Wilson at any time make a demand for the stock? A. No, sir. Q. Did he ask for the stock? A. No, sir. Q. Did he ever request you to deliver it? A. No. All the conversation that was had between Mr. Wilson and myself related to what had occurred between Mr. Burr and Mr. Hake. Q. In regard to the first demand, about the 31st of October? A. Yes. All the conversation and all the correspondence related to that and nothing else."

The respondent's contention, that it should be held as matter of law that the conversation of January fourteenth, which we have quoted, constituted a legal demand for the stock and a refusal, must

be considered, for, while such was not the view of the trial court, no harm resulted to the defendants if the court, instead of charging that a demand was made, erroneously charged, as appellants urge, that there was a refusal, and that, therefore, a demand was not necessary. Whether there was a demand for the stock on the fourteenth of January seems to have presented a question of fact for the jury rather than one of law for the court. In the first place, it should be borne in mind that a demand was made by the plaintiff on the thirty-first day of October. True, that demand cannot avail him in this suit, but it was immediately following that demand that the defendants referred the matter to their attorneys and so advised the plaintiff's attorneys. They made no such reference after the first of January, when the plaintiff was in a position to have made an effective demand. Was it their intention to refer to their attorneys the matter of determining what was their right and duty in the situation as it then existed, which embraced a demand for the stock prematurely made upon them personally, or to authorize their attorneys to represent them in such future steps as the plaintiff should find it necessary to take in order to create what then did not exist, viz., a cause of action against them in favor of the receiver? Again, how did the plaintiff understand it? Was he relying upon the demand already made? Did he or his attorneys understand that a further demand was necessary in order to charge the defendants with conversion, and, if so, that such demand could be made upon the attorneys rather than on the defendants?

Without further reference to the suggestions which the situation prompt, it would seem that a question was presented for the jury whether, under the evidence, it was the understanding of both parties that Hatch & Wickes, the attorneys, should represent the defendants for the purposes of the making of a demand upon them, should one be found necessary, in order to charge them with liability. Assuming such question of fact to be found in favor of the plaintiff, the next question would be whether a demand was made on Kenyon. It is true, as the respondent insists, that there is no stereotyped manner of demand recognized by the law, and that any demand which indicates clearly what is demanded, who are the parties, and the authority of the person making the demand, will be sufficient. The plaintiff says that when Mr. Wilson, representing

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the plaintiff, asked Mr. Kenyon whether now Hatch & Wickes would advise the Hake Company to deliver the stock to Mr. Delahunty as receiver, he made a demand for the stock. Is it certain that his purpose in making that remark was to make a demand? It may well be that the parties to that conversation supposed that they were conducting amicable negotiations, looking to the possible adjustment of the differences without litigation, and based in part upon the premature demand of October thirty-first. It cannot be held, as matter of law, therefore, that a demand was then made. Indeed, the most favorable holding possible for the plaintiff is that the jury were at liberty to find that Mr. Wilson intended to make a demand; that Mr. Kenyon was the defendants' authorized representative, and so understood it, and that what he said was intended for a refusal. The charge of the court upon the subject, and the whole of it, is as follows: "He must make a demand after January, 1896. I say to you there is no dispute upon that point; that the plaintiff's lawyer and defendants' lawyer both agreed that the conversation was, 'We will give no certificate,' and no demand is needed where there is a refusal in advance." To this portion of the charge defendants' counsel excepted. It will be observed that the learned court submitted no question whatever to the jury upon the question of demand or refusal. The effect of his charge was a direction that, so far as that branch of plaintiff's case was concerned, it was made out. Undoubtedly a situation may be presented where a refusal of a party to surrender possession of property may do away with the necessity of a demand. The instances of it are rare, for the party in possession of personal property seldom seeks out the real or pretended owner to refuse him possession of property. He usually waits until called upon to surrender possession before refusing to do it. And where, as in this case, the possession of the party is rightful, and he has not attempted to dispose of it, or exercise acts of dominion over it, it is necessary to show some act amounting to a conversion, and evidence of a demand is usually a necessary part of such proof. Where a refusal to make delivery is accepted as an equivalent of both a demand and refusal, it must appear that the necessity for a demand was dispensed with. Such a case was *Rider v. Pond* (19 N. Y. 262). The answer averred that the defendant himself gave notice to the plaintiff that

he was ready to perform, and pursuant to such notice the parties met at the defendant's office in the city of New York, and there the defendant refused to deliver the security, which he ought to have delivered, except upon conditions named which he had no right to impose, and it was held that a demand was thereafter unnecessary. But in this case there was not a meeting of the parties. It was a meeting of the clerks of the attorneys for the parties for the purpose of ascertaining what were the rights of the clients of their respective employers, and what advice ought to be given them in the premises. At the most, there was presented a question of fact whether the parties to this conference and their employers understood that the attorneys had the right to represent the defendants as to a demand. But as we have already sufficiently discussed that subject, further reference to it will not be made.

Again, it was for the jury to say whether both parties to that conference supposed they were acting under a situation created in part by the demand of October thirty-first, and were merely considering what advice should be given to their respective clients in view of it, or whether the parties were intending to provide for a new situation which in part came into existence after the thirty-first day of December, and, therefore, intended to refuse delivery in behalf of the defendants. These questions were for the jury, not for the court, to pass upon. But they were taken away from the jury, and the exception taken thereto entitles the defendants to a reversal of the judgment.

The judgment should be reversed and a new trial ordered, with costs to the appellants to abide the event.

RUMSEY and PATTERSON, JJ., concurred; VAN BRUNT, P. J., concurred in result; O'BRIEN J., dissented.

O'BRIEN, J. (dissenting):

I think the evidence, taken as a whole, upon the question of demand is fairly susceptible of but one inference, viz., that the defendants' course would be controlled entirely by the advice of their counsel, to whom plaintiff was referred. Thereafter, a demand on the defendants would have been a useless and senseless formality, because they had said in substance that they would be guided entirely by their counsel. The plaintiff, therefore, very properly,

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as directed and requested personally and by letter, sought out the defendants' attorneys after December 31, 1895. The exact language used between the representatives of the respective counsel is of no moment, because both agree that on that occasion the plaintiff's representative was told in effect that the defendants would not deliver the stock because Knott had failed to perform; because he had assigned the certificate, etc. I think the trial judge was right in holding as matter of law that a demand on the defendants personally after December thirty-first was unnecessary, because their attorneys represented them and were authorized to state to the plaintiff the stand which the defendants would take. This, as communicated to the plaintiff, was that the stock would not be delivered for the reasons given at the interview. It is clear, moreover, that the defendants would not, contrary to counsel's advice, have responded to any demand. Under those circumstances, to hold that such a demand was necessary would be to take advantage of a technical point or ground and reverse a proper judgment in plaintiff's favor, in a case that has already been twice tried.

I, therefore, dissent.

Judgment reversed, new trial ordered, with costs to appellants to abide event.

MILTON RATHBUN, Respondent, v. ANTON MAJEWSKI, Appellant.

Goods sold — delivery to a third person — submission to the jury of the question who is obligated to pay therefor.

Where there exists such a conflict in the testimony of two parties who had negotiated a sale of certain hay and oats, as to whether the purchase was made upon the credit of one of the parties or upon that of a third person at whose stable they were delivered, as requires the submission of that question to the jury, considered.

APPEAL by the defendant, Anton Majewski, from a judgment of the Supreme Court in favor of the plaintiff for \$370.39, entered in the office of the clerk of the county of New York on the 26th day of June, 1896, upon the verdict of a jury, and also from an order, bearing date the 24th day of June, 1896, and entered in said clerk's

office, denying the defendant's motion for a new trial made upon the minutes.

Edward S. Johnston, for the appellant.

George Ryall, for the respondent.

PARKER, J. :

This action was brought to recover the sum of \$254.32, the agreed price of hay and oats, which the plaintiff claims to have sold to the defendant. The answer denied any agreement on the part of the defendant to pay for the hay and oats. It appeared without dispute upon the trial that one Conkling was the owner of the contents of a livery stable, at which the hay and oats were delivered; that this defendant was the holder of the first and third chattel mortgages on stock in the stable, aggregating in amount about the sum of \$7,000, and that he sought out Frank J. Lennon, an employee of the plaintiff, asking him his price for hay and oats. The result of the conversation was the delivery of a quantity of both hay and oats at Conkling's stable. As to the nature of that conversation, Lennon, plaintiff's employee, and the defendant differ very widely. Lennon testified that at the interview brought about by the defendant, which took place at his office in Goerck street, inquiry was made as to his price for hay, and that when he made answer the defendant said: "That is considerably less than I am paying. This man that has been supplying me with hay has been robbing me, charging me \$1.10, and your price is only 95 cents." He further testified that in the course of that conversation the defendant gave him as a reason for running Conkling's stable, "that he held a first mortgage on the stock and also a third mortgage, and he said that he found out from investigating things that the employees of Mr. Conkling were robbing him, and that if they continued to rob him that he would never be able to get his money out of it, and he said, 'For that reason I have taken charge,' and he says, 'I am going to see that there is no stealing done,' and 'I am going to buy things from whom I can buy them the cheapest. Come down every two weeks for every thing you sell and I will pay you your money.' He took a bill off the file in his office and he showed me 'There is the feed-man's bill for the previous two weeks receipted.'" Lennon also

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asked the defendant for his name and address, and he testified that the defendant tore off a bill from a pad lying on the desk and said, "Make out a bill for me and send me the feed to the stable in Mangin street, and send me the bill and about every two weeks come down here and get your money." Lennon testified that he followed the defendant's directions, and that hay and oats of the value claimed in the complaint were delivered from time to time, and after each delivery bills were sent to the defendant as requested, but no part thereof was paid. When payment was finally insisted upon the defendant claimed that collection must be made from Conkling or not at all. If Lennon states the conversation and transactions correctly the plaintiff's right to recover was clear.

The defendant, while not disagreeing with the plaintiff's witnesses as to the manner in which they came to meet, or as to which one introduced the subject of buying hay for Conkling's stable, denies having had such a conversation with Lennon as he testifies to, or that, in words or substance, he agreed to purchase of him hay and oats for Conkling's stable. From his testimony it appears that he would have had the jury believe that he not only did not purchase the merchandise of the plaintiff, but that he cautioned plaintiff's employee that Mr. Conkling was slow pay, and that after such caution, to prevent any possible misunderstanding, he added, "I told him he would have to look out for his money from Mr. Conkling." If the defendant's story was true the plaintiff was not entitled to recover.

Thus an issue of fact was presented which was submitted to the jury in a charge by the court, to which no exception was taken, and their verdict was for the plaintiff. As no errors were committed by the court the verdict must stand, unless against the weight of evidence, and we have no hesitation in deciding that it was not.

The judgment should be affirmed, with costs.

VAN BRUNT, P. J., RUMSEY, PATTERSON and O'BRIEN, JJ., concurred.

Judgment affirmed, with costs.

AMELIA M. GRAHAM, Plaintiff, *v.* THE LAWYERS' TITLE INSURANCE
COMPANY of the City of New York, Defendant.

Mortgage foreclosure—who are necessary parties to it—a conveyance by the mortgagor to a receiver of his property—his right is only to compel the receiver to account—voluntary appearance of a receiver as “John P. Jenkins, Receiver.”

After the giving of a mortgage, one John P. Jenkins was appointed receiver of the property of the mortgagor, a judgment debtor, who, pursuant to the order of the court, assigned, by a deed of conveyance, all his property to the receiver. Thereafter the receiver was made a party defendant to an action brought for the foreclosure of the mortgage, being described in the title of the action as “John P. Jenkins, Receiver,” and subsequently an attorney appeared generally therein for “John P. Jenkins, Receiver.” The executor of the mortgagor was made a party, but all his heirs were not made parties to such action.

Held, that the effect of the conveyance was to vest the title to the equity of redemption of the mortgaged property in the receiver, and that there remained in the mortgagor only a right to demand an accounting from the receiver, which right passed to his executor;

That his voluntary appearance was sufficient to bind Jenkins, in his capacity as receiver, by the judgment of foreclosure.

SUBMISSION of a controversy upon an agreed statement of facts pursuant to section 1279 of the Code of Civil Procedure.

The defendant insured the title of the plaintiff to certain premises in New York. Subsequently plaintiff's title was rejected upon an examination for a loan for which application had been made to the Harlem Savings Bank. The loss which the plaintiff claims to have sustained up to the present time is the sum of seventy-four dollars, paid for counsel fees in the examination of the title. The plaintiff claims that the title is not good and marketable, while the defendant insists that it is and nothing is due under the policy.

On March 31, 1858, Benjamin M. Whitlock was the owner in fee of the premises in question. On that day he executed a mortgage thereon to Gouverneur Morris to secure the sum of \$4,000. Subsequently three judgments were recovered against Whitlock, and docketed in the county of Westchester, in which the premises were situated. Executions thereon were subsequently issued to the sheriff, who returned them unsatisfied, and thereafter supplementary proceedings were instituted, which resulted in the appointment of

one John P. Jenkins as receiver of all the property of the said Benjamin M. Whitlock, who was ordered to assign and transfer all his property to the said receiver. In obedience to said order, Whitlock thereafter executed and delivered to the said receiver a deed conveying all of his property, including the premises in question, and the deed was duly recorded. A little later Whitlock died, and shortly thereafter a suit was commenced to foreclose the mortgage hereinbefore referred to. To this suit, John P. Jenkins, receiver, was made a party defendant, being named and described in the title and caption of the said action as follows, and not otherwise, viz.: "John P. Jenkins, Receiver." Subsequently he appeared generally in the action by attorney, the notice of appearance stating that he appeared for John P. Jenkins, receiver. Whitlock's heirs and devisees were not all made parties to the suit, but his executors were and appeared by attorney.

Albert E. Seibert, for the plaintiff.

David B. Ogden, for the defendant.

PARKER, J.:

The plaintiff's first contention is that the title of the debtor Whitlock did not unqualifiedly vest in Jenkins as receiver; that such title as this officer of the court acquired was so qualified and limited as not to exhaust the title of the judgment debtor which descended to his heirs at law upon his death, and as they were not made parties defendant in the foreclosure action, they have not been divested of that title. The plaintiff claims that this position is fully supported by *Moore v. Duffy* (74 Hun, 78), but a careful examination of the case discloses that this claim is not well founded. In that case the debtor did not convey his real estate to the receiver. An order appointing a receiver was made, and from the time of its filing the real property became vested in the receiver. (Code Civ. Proc. § 2468.) Subsequently the judgment debtor conveyed his right, title and interest to a third party, and it was held that, subject to the right of the receiver to resort to the land for the payment of the judgment, the title remained in the judgment debtor, and by his conveyance to Costello, became vested in him.

In the case at bar, if the court, after making the order appointing the receiver, had omitted to take further action, *Moore's* case and this one would have been alike in so far as the question now under consideration is concerned. But Whitlock, instead of conveying whatever interest he had in the premises to a third party, as in *Moore's* case, conveyed it to the receiver. If it be assumed, therefore, that by the order appointing Jenkins receiver he only acquired the right to resort to the land to pay the judgment, the title remaining in Whitlock, still that title subsequently became vested in the receiver by the deed from Whitlock. It matters not whether the conveyance was made voluntarily or in pursuance of an order of the court, for in either case the legal effect was to divest the grantor of title and vest it in the grantee. Thereafter the right remained in the judgment debtor to call upon the receiver to account, which right was a chose in action, and passed to the executor who was made a party defendant in the foreclosure suit. (*Porter v. Williams*, 9 N. Y. 150; *Banks v. Potter*, 21 How. Pr. 473.)

The title having been vested in the receiver by a deed duly executed and recorded, it was not necessary that his grantor or any of his predecessors in title should have been made parties to the foreclosure suit, but it was essential, in order to divest the receiver of title, that he should be made a party. "John P. Jenkins, receiver," was made a party; but it is said that this was not a sufficient compliance with the rule which requires that a reasonably definite description of a party appearing in a representative capacity must be contained in the title of the action, or, in default thereof, that the allegations in the body of the complaint must clearly indicate the precise character in which the party is sued. In *Landon v. Townshend* (112 N. Y. 93), Mr. Waddell, general assignee in bankruptcy, was made a defendant without any addition whatever to his individual name, and he appeared by an attorney, the notice being in the general form specifying an appearance "for the defendants in the action." So far as the record of the case on appeal shows, there was no reference either in the summons and complaint or in the proceedings at any stage of the nature of his title or interest in the premises. In form, therefore, the action was against him as an individual, and his appearance was in his individual, and not in his representative, character. It was held that the foreclosure was insuffi-

cient to bar the equity of redemption of the defendant as assignee in bankruptcy. In the opinion the court said: "To bind the estate of a bankrupt in the hands of his assignee by an adverse judicial proceeding, or by a judgment of foreclosure in a suit commenced after the bankruptcy, it is, we think, indispensable that the suit or proceeding should have been brought against the assignee distinctively in his representative and official character, or, at least, that it should in some way appear on the face of the proceedings that they related to or affected the bankrupt's estate, and that it is not sufficient that the assignee is individually named in the process or pleadings without any averment of his representative character. That is, we think, in accordance with the general tenor of adjudication. The papers served on Waddell gave him no notice that the suit related to the property of the bankrupt."

It is said in this case that the receiver did not have notice that the suit related to the property of the judgment debtor, because, while the word receiver was used, it was but a *descriptio personæ*, and did not give to him other than a personal or individual character in the action. Assuming that such would be its legal effect if standing alone, we are further to inquire whether, considered in connection with other steps in the action, his representative character in the suit was affixed to him. In *Beers v. Shannon* (73 N. Y. 297) the court said: "But it has been held on the other hand that, though there be nought in the title of the process or the complaint to give a representative character to the plaintiff that the frame and averments and scope of the complaint may be such as to affix to him such character and standing in the litigation." It is true that there was nothing in the complaint, aside from a description of the premises, to apprise him that he was made a defendant in his representative capacity, and if he had refrained from taking a part in the litigation he might have urged that he did not have notice that he was made a party in his official character. He did not take this course, however, but appeared generally in the suit by attorney, who described him in the notice of appearance as receiver. His voluntary appearance not only indicated that he was in fact apprised that the suit was brought against him in his representative capacity, but, considered in connection with the contents of the summons, it operated to affix to him as a defendant his representative capacity in the

suit, and the judgment of foreclosure divested him as receiver of all title to the premises.

The defendant should have judgment, with costs.

VAN BRUNT, P. J., RUMSEY, PATTERSON and O'BRIEN, JJ., concurred.

Judgment ordered for defendant, with costs.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. DORA GOLDBERG, Appellant.

Petit larceny—good character of the accused—conviction reversed as against the weight of evidence.

A woman of good character, after making some purchases at a store, picked up a cotton umbrella, worth ninety-eight cents, belonging to the storekeeper, and with it and her purchases left the store. On reaching the door she said to her sister, who accompanied her, "See, this is not my umbrella," and at that moment was arrested on a charge of stealing the umbrella by a detective, who testified that she saw her take and remove the tag from the umbrella and slip the umbrella under her cape, in which statement, however, the detective was not corroborated. The accused at once admitted the taking of the umbrella, stating that it was taken through inadvertence in place of her own silk umbrella.

Held, that a conviction based upon such evidence should be reversed under section 527 of the Code of Criminal Procedure, making it the duty of the appellate court to order a new trial when it is satisfied that the verdict is against the weight of evidence or against law, or that justice requires a new trial, "whether any exception shall be taken or not in the court below."

APPEAL by the defendant, Dora Goldberg, from a judgment of the Court of Special Sessions of the Peace in and for the city and county of New York, rendered on the 18th day of February, 1897, convicting her of the crime of petit larceny.

David Leventritt, for the appellant.

John D. Lindsay, for the respondent.

PARKER, J.:

Section 527 of the Code of Criminal Procedure makes it the duty of this court to "order a new trial if it be satisfied that the verdict

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against the prisoner was against the weight of evidence or against law, or that justice requires a new trial, whether any exception shall have been taken or not in the court below." In the performance of that duty, we are led to order a new trial for the defendant, because we are firmly convinced that she ought not to have been convicted on the evidence before the court.

The defendant, who had been a married woman for some eighteen years, and was the mother of three children, left her residence in Brooklyn, where she had lived some ten years, on the 30th day of January, 1897, to do some errands in the city of New York. She was accompanied by her sister, who was also a married woman living next door. Their husbands were both in the real estate business. It was a cloudy day and the defendant took with her an umbrella. Their first stopping place was No. 1 Great Jones street, where the defendant had some dental work done by Dr. Kunz. The doctor had been accustomed to do the dental work of the defendant and her family for about ten years. Subsequently they went to Cammeyer's shoe store on Sixth avenue, where both sisters made some purchases of shoes. The defendant concluded to carry her purchase, as she wanted to make use of them the next day, but her sister had hers delivered. Then they went across the street to O'Neill's to purchase some embroidery, and the defendant went direct to the embroidery counter and called for twenty-five yards of that material; but as there happened to be but twenty-six and a half yards in the piece that was shown her, she took the entire piece, paying for twenty-six yards. While she was examining the embroidery and paying for it, her packages were lying on the counter and her sister was standing in her immediate vicinity. The embroidery being paid for, she took up her bundles and also an umbrella, and accompanied by her sister, passed out of the door, which was but a few feet from the counter where she had done her trading. The umbrella, however, was not hers, but O'Neill's. Hers was a silk umbrella with a handle finished more perfectly than the ninety-eight cent cotton umbrella of O'Neill's. Did she steal this umbrella, or was its taking a mere inadvertence?

According to the defendant's testimony, when she passed out of the door, she asked her sister to help her with her parcels, and then discovered that the umbrella was not hers, and at once she said to

her sister, "Eva, see, this is not my umbrella," and at that moment O'Neill's detective placed her hand upon her shoulder, and, pointing to the umbrella, said, "You stole it." She was arrested and taken to the nineteenth precinct station, where the matron was requested to search her. The matron testified that she searched for shoplifters' bags, etc., but found only a small pocket in her cape, and that she gave her a thorough search, but found only a pair of shoes with Cammeyer's wrapper on them and twenty-five yards of embroidery, with a paid ticket, at twenty-five cents per yard. The People, to establish the charge of larceny, called one witness, a Miss Eltoft, who was a private detective at O'Neill's, and who testified as follows: "I saw her take an umbrella from the umbrella rack. I saw her slip it down by her side and take the tag off it, and then slip it under her cape as far as she could get it, and walk a little ways down the aisle. She met another woman, whom I learned afterwards was her sister. They had been looking at some goods. They left the store. I followed her a little south. I requested her to return to the store with me. She had the umbrella with her when I followed her on the street." This witness also testified that the place from which the umbrella was taken was not the umbrella department, but that between the lace counter and the embroidery counter stood a rack in which umbrellas were kept, and that it was from this rack that the umbrella was taken. No one was called to support her testimony. This detective's testimony has no other support except, in fact, that the umbrella was carried out of the store by the defendant.

The defendant denied taking any umbrella out of the rack, or removing a tag from the umbrella, or that she saw a rack of umbrellas. She said that when she entered the store to purchase the embroidery the first counter she came to, after passing through the door, was the embroidery counter; that she made her purchase, and while selecting it laid her parcels upon the counter; that after the embroidery was done up and paid for, she picked up the bundles and the umbrella, which she supposed was the one she left home with that morning, and that the umbrella was leaning up against the counter right where her parcels were, and it was the only umbrella she saw in the store; that she first discovered her mistake when handing a portion of her parcels to her sister, to whom she said, "Eva, see, this is not my umbrella," and at that moment the

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detective took it from her hand, accusing her of stealing it. Her sister corroborates her story as to the time when they left home, and as to all the main occurrences of the day, and insisted that if her sister had removed the tag from any umbrella in that store she would have seen it, and that she did not. She also testified that the defendant did not leave the embroidery counter and go to any other part of the store. She also corroborates her sister's statement that a moment before being accosted by the detective and charged with stealing the umbrella, the defendant said to her, "Look, I have taken an umbrella."

There are men and women in every community whose word, were they placed in a situation similar to that of the defendant, would be accepted unhesitatingly as against such testimony as the People produced on this trial. Their reputations are so firmly established in the community in which they live that the charge that they had taken a tag off a ninety-eight cent cotton umbrella and secreted it partially under an outer garment would not be believed although several detectives should testify to it. In the administration of criminal law the courts have ever attached the utmost importance to the evidence of good character. "Evidence of good character is not only of value in doubtful cases and in prosecution of minor offenses, but is entitled to be considered when the crime charged is atrocious, and also when the testimony tends very strongly to establish the guilt of the accused. It will sometimes of itself create a doubt when without it none would exist." (*Cancemi v. People*, 16 N. Y. 501; *Stevens v. People*, 4 Park. 481; *Commonwealth v. Webster*, 5 Cush. 295.) "No matter how conclusive the other testimony may appear to be, the character of the accused may be such as to create a doubt in the minds of the jury and lead them to believe, in view of the improbabilities that a person of such character would be guilty of the offense charged, that the other evidence in the case is false or the witnesses mistaken." (*Remsen v. People*, 43 N. Y. 8, 9.)

The defendant attempted to show by the method pointed out by law that she was a woman of good character, bearing a good reputation among her neighbors and acquaintances. A merchant, in whose employ she was for five years immediately preceding her marriage, supported in strongest terms her reputation for honesty and veracity. A captain of the police, in whose precinct the defend-

ant lived and who had special opportunities for hearing the speech of people, not only asserted that her reputation for veracity and honesty was of the best, but that she was held in esteem and regard by her neighbors and was charitably inclined. The pastor of the First Congregational Church of Jamaica, who had known the defendant for some nine or ten years and lived in her vicinity, testified that her reputation was first class. The defendant, continuing with this line of testimony, called a Mrs. Anderson, and after she was sworn, the court said: "Do you intend to prove character by this witness?" Counsel: "I do." The Court: "Don't you think you have gone far enough with the question of character? We think we have enough on the subject, except the prosecution attacks it, and then they are to inform you of that." Here was plainly an intimation from the court that, as the evidence stood, the defendant had established that she was a woman of good character and that her reputation for honesty and veracity was so firmly grounded that it was unnecessary for her to call other witnesses to support it. The court was right in that conclusion. It was supported by the testimony of one who had watched her during her early girlhood, and for five years in a situation where many have failed to resist temptation; and by the testimony of those who knew of her walk in life while discharging the important responsibilities which fall upon a mother of several children. And against it there is not a whisper except the testimony of a detective that she tore a tag off an umbrella which a woman in her position would hardly be seen carrying in the streets, and the circumstance that the umbrella was in her possession when she stepped out of the door.

Giving to her good character the weight to which it was entitled in a case like this, and considering the defendant's testimony and that of her sister in the light of all the circumstances surrounding the occurrence, including their movements on that day, we reach the conclusion that a conviction ought not to have been had.

The judgment of conviction should be reversed and a new trial ordered.

PATTERSON, RUMSEY and WILLIAMS, JJ., concurred.

Judgment reversed and new trial ordered.

THE UNION STOVE WORKS, Respondent, v. FREDERICK KLINGMAN
and Others, Appellants.

Mechanic's lien—verification by an agent of a company—when furnaces and ranges are fixtures—a lien may be supported for labor and materials used in setting such furnaces and ranges.

A mechanic's lien signed "Union Stove Works, by Newton H. Burr, agent," verified by the affidavit of the agent, in the precise words of the statute (Laws 1885, chap. 342, § 4), is sufficient as to its verification, although it does not appear therefrom whether the verification was based upon the knowledge of the agent, or upon information and belief.

Where a contractor, during the construction of flats, for the purpose of sale, furnishes to the owner thereof, furnaces set in the cellars, from which pipes run to the chimneys and through the partitions to registers on different floors, and also ranges having the usual attachments and connected with the water pipes, the circumstances indicate that the furnaces and ranges are intended to be annexed to the realty and to pass as fixtures, and the contractor is entitled, under the statute, to file a lien against the property, not only for their value, but also for the labor of setting them and for the necessary pipes and appliances furnished therewith, although a portion of the material, notably the ranges, may be removed from the buildings without difficulty.

APPEAL by the defendants, Frederick Klingman and others, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 22d day of December, 1896, upon the decision of the court rendered after a trial at the New York Special Term in an action brought to foreclose a mechanic's lien.

George Bell and Benjamin Patterson, for the appellants.

Frank M. Avery, for the respondent.

PARKER, J. :

The defendant Klingman purchased of the plaintiff sixty-eight Astor ranges, boilers and attachments, and four hot-air furnaces with hot-air pipes, smoke pipes and registers, to be used in a building which he was erecting. For such material, and the labor necessary in setting the same, the defendant became indebted to the plaintiff

in the sum of \$1,991.64, and the latter caused a mechanic's lien therefor to be filed within the time provided by statute. This suit was brought to foreclose such lien and it resulted in a judgment in favor of the plaintiff.

On this review the defendant urges (1) that the verification of plaintiff's notice of lien was not in conformity with the statute, and that, therefore, a valid lien was not created; (2) that the ranges were not permanently affixed to the freehold, and, therefore, not within the scope of the statute which authorizes a lien "for materials used in erecting, altering or repairing any house," etc.; and (3) that the plaintiff failed to show a performance of the contract on its part.

The lien was signed "Union Stove Works, by Newton H. Burr, agent," and was verified by the affidavit of the agent. The Mechanics' Lien Act provides for an execution and verification of the notice of lien by an agent (Laws 1885, chap. 342, § 4), and this verification was in the language of the statute. The appellant, conceding that the verification is in the precise words of the statute, urges that it is not within its spirit because it does not appear therefrom whether the verification was based upon the knowledge of the agent or upon information and belief. We regard this question as no longer open for discussion. It has been frequently held that a verification following the exact language of the statute is sufficient. (*Schwartz v. Allen*, 7 N. Y. Supp. 5; *Moore v. McLaughlin*, 66 Hun, 133; *Staubsandt v. Lennon*, 22 N. Y. Supp. 544, 545; 3 Misc. Rep. 90; *affd.*, 142 N. Y. 666; *Ward v. Kilpatrick*, 85 id. 413, 417; *Kealey v. Murray*, 61 Hun, 619; see, for opinion, S. C., 15 N. Y. Supp. 403; *Boyd v. Bassett*, 16 id. 10, 11.)

We agree with the trial court that the labor performed in setting the furnaces and ranges and the furnishing of such furnaces and ranges with the necessary pipes and appurtenances constituted labor performed and materials furnished in the erection of houses, within the meaning of the statute. The buildings for which these materials were furnished, and on which the labor for which recovery was had was performed, were four five-story flats situated in the city of New York. They were built by the defendant for the purposes of sale, and they were subsequently sold, the furnaces and ranges passing into the possession of the purchaser as part of the structure. The furnaces were set in the cellars of the houses, and

connected with the chimneys by stove pipes, and with the buildings by hot-air pipes running through the houses and to the different floors. The hot-air pipes, the furnishing of which constituted part of the entire contract, which included hot-air furnaces, Astor ranges, boilers and attachments, and the value of which is included in the recovery in this action, were put in by the plaintiff while the buildings were in process of construction, and while the partitions were being built. They ran to registers on the different floors, and where the pipes were built into the partition the plaintiff furnished and put in iron, lath and tin. The ranges were equipped with warming closets, water backs, boilers, pipes, tubes and couplings, and were set into position on hearths provided for that purpose, and were connected with the chimneys by a smoke pipe; they were also connected with the water pipes running through the buildings by iron pipe connections screwed to the boilers. While it is true that some portion of the material, for which recovery has been had, could have been removed without difficulty, notably the ranges, the object of the erection of the buildings and the circumstances surrounding their purchase, and their annexation to the freehold, are sufficient to support the conclusion that it was the intent of the parties that they should be annexed to the realty and pass as fixtures. It is the general rule that fixtures of this character, whether actually or constructively annexed to the freehold, pass by conveyance or mortgage where there is nothing to indicate a contrary intention. (*Pratt v. Baker*, 92 Hun, 331; *Grosz v. Jackson*, 6 Daly, 463; *Voorhees v. McGinnis*, 48 N. Y. 278, 282; *Ward v. Kilpatrick*, 85 id. 413; *Watts-Campbell Co. v. Yuengling*, 125 id. 1; *Buckley v. Buckley*, 11 Barb. 43, 63; *In re Eureka Mower Co.*, 86 Hun, 309, 312; *McRea v. Cent. Nat. Bank*, 66 N. Y. 489; *Quimby v. Sloan*, 2 E. D. Smith, 594.)

The cases cited by the appellant (*Duffus v. Howard Furnace Co.*, 8 App. Div. 567, and *Kerby v. Clapp*, 15 id. 37) are not in point. In the *Duffus* case the furnaces, and in the *Kerby* case the ranges and heaters, were sold under a contract of conditional sale, which expressly provided that the property should remain the property of the seller until paid for. The only evidence of the intent of the parties was furnished by the agreement itself, and from that it appeared that both the vendor and vendee elected

to treat and hold the articles as personal property even after they were annexed to the building.

The appellant also contends that the plaintiff did not do the work in the best manner, not using the best material, and not leaving the furnaces in a thorough working condition, as provided by its contract. Evidence was offered tending to show that the ranges smoked so badly that the apartments were frequently filled with smoke, causing the tenants to vacate the premises; that the water backs were defective: that the offsets on the ranges were not of proper construction, and the setting of the furnaces was faulty. The plaintiff attempted to meet these charges of faulty construction by a description of the work performed, and experts were called by both the plaintiff and the defendant. The plaintiff's experts testified that the construction was proper, usual and effective, while the defendant's experts presented a contrary view. Thus was presented a question of fact, which the learned trial court found, and, as we think rightly, in favor of the plaintiff.

The judgment should be affirmed, with costs.

VAN BRUNT, P. J., RUMSEY, PATTERSON and O'BRIEN, JJ., concurred.

Judgment affirmed, with costs.

PEOPLE OF THE STATE OF NEW YORK ex rel. GEORGE STEINSON,
Appellant, v. THE BOARD OF EDUCATION OF THE CITY OF NEW
YORK, Respondent.

Teacher — mandamus to compel reinstatement, denied because of laches involved in his seeking another remedy.

A renewal of a license to teach having been refused by the city superintendent of schools of the city of New York, the applicant therefor appealed to the State Superintendent of Public Instruction, by whom a decision was made in 1890, determining that the appellant had been unlawfully deprived of his position, and that he was entitled to exercise the functions and receive the emoluments of a teacher, until such time as his certificate (which had been theretofore given to him by the State Superintendent of Public Instruction) should be revoked by competent authority.

He thereupon tendered his services as a teacher, and they having been declined, he made application in 1890 for a mandamus to compel the payment of his sal-

ary, which was denied at Special Term, whose decision on appeal was affirmed at the General Term in 1891, and subsequently by the Court of Appeals in 1896. Thereafter an application was made by him for a peremptory writ of mandamus to reinstate him as a teacher in the public schools of the city of New York.

Held, that such application should be denied because of *laches*;

That persistence in the prosecution of a fruitless proceeding in defiance of decisions of the courts, cannot be held to excuse delay in the prosecution of a proper proceeding.

APPEAL by the relator, George Steinson, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 21st day of September, 1896, denying his application for a peremptory writ of mandamus to reinstate him as a teacher in the public schools of the city of New York.

J. Campbell Thompson and *John T. Little, Jr.*, for the appellant.

Terence Farley, for the respondent.

PARKER, J.:

Prior to the month of September, 1886, the relator was examined by the State Superintendent of Public Instruction as to his qualifications as a teacher. The outcome was a certificate duly issued and delivered to him, which gave him authority to teach in any public school within this State. Subsequently, a provisional license was issued to him by the city superintendent of schools of the city of New York, which, on its face, purported to give him authority to teach in the public schools of such city for the period of six months, and thereupon he was appointed by the school trustees of the first ward as an assistant teacher in Grammar School No. 29. Upon the expiration of this provisional license, it was renewed by the city superintendent on the same terms, and from time to time thereafter renewals were granted to the relator, the last of which expired on the 12th day of March, 1890, at which time a further renewal was refused. It was claimed by the local school authorities that thereupon he became disqualified to teach, and he was thereafter prevented from teaching. Thereupon the relator took an appeal to the State Superintendent of Public Instruction, pursuant to the provisions of section 1039 of the Consolidation Act (Chap. 410 of 1882). Upon such appeal a hearing was had before the State Superintendent

at which the relator and the board of education of the city of New York were respectively represented by counsel. Thereafter, and on the 15th day of July, 1890, the State Superintendent filed a decision with the clerk of the board of education of the city of New York, in which it was determined that the relator had been unlawfully deprived of his position, and that he was entitled to exercise the functions and receive the emoluments of a teacher until such time as his certificate should be revoked by competent authority or he be removed from his position in the manner provided by statute. Immediately thereafter the relator tendered his services as teacher and made demand of the proper authorities that he be allowed to exercise the functions of assistant teacher in Grammar School No. 29, but the offer of his services was rejected, his demand not heeded, and since that time he has not been engaged in teaching. On June 5, 1896, nearly six years after the making of the decision by the State Superintendent of Public Instruction, the relator instituted this proceeding, by which he seeks to obtain a peremptory writ of mandamus commanding the board of education of the city of New York to reinstate him in his position as a teacher in the public schools of the city of New York.

The order of the Special Term denying his application must be affirmed, on the ground that the relator was guilty of *laches* in permitting so long a period of time as nearly six years to elapse before making the application. (*People ex rel. Miller v. Justices*, 78 Hun, 334; *People ex rel. Young v. Collis*, 6 App. Div. 467.) The excuse which the relator offers for his delay in making this application is, that he instituted a proceeding by mandamus to compel the payment of the salary of a teacher to him in 1890, and that the decision of the Court of Appeals therein was not made until March 13, 1896, a little over two months and a half before this proceeding was instituted. If it be assumed that a mistake in the selection of a remedy can ever operate as an excuse for delay in instituting a proper proceeding, certainly the facts of this case do not afford such excuse. On the 13th day of January, 1891, the court, at Special Term, denied his motion for a peremptory writ of mandamus to compel the payment of his salary as a teacher; and by that decision he was advised that he was mistaken in his remedy. Nevertheless, he appealed to the General Term, which court, in June

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1891, affirmed the order of the Special Term, and in the opinion of the court, delivered by Mr. Justice PATTERSON, it was pointed out that the proceeding was one to compel the payment to him of the sum alleged to be due as salary, and not for reinstatement in his place as teacher. But instead of heeding the suggestion of the court and instituting the proper proceeding, the relator elected to wait until a decision of the Court of Appeals should be had; and he prosecuted the appeal with so little diligence that not until nearly four years thereafter was the case submitted to that court, the result of which was an affirmance upon the opinion of the General Term. Persistence in the prosecution of a fruitless proceeding, in defiance of decisions of the courts, cannot be held to excuse delay in the institution of a proper proceeding.

The order should be affirmed, with fifty dollars costs and printing disbursements.

VAN BRUNT, P. J., RUMSEY and PATTERSON, JJ., concurred.

Order affirmed, with fifty dollars costs and disbursements.

HELOISE L. JOUFFRET, Respondent, v. JEANNETTE LOPPIN and Others, Infants, by WILLIAM D. RICE, JR., their Guardian ad Litem, Appellants, Impleaded with ALBERT J. LOPPIN and Others, Respondents.

Legacies cannot be paid from the proceeds of realty unless charged upon it — creditors of a decedent cannot be paid the money realized in an action to partition his real estate until the debts are proved in the Surrogate's Court.

The will of Alexander Loppin gave to each of his three children the sum of \$10,000 and directed that the house in which he lived, and which was the only real estate then owned by him, should be sold and that the balance remaining after the payment of the sum before named should "be divided into five equal part between the survivors or their issue, the said Aimee Bell, Heloise Loppin, Albert Loppin, Alice Loppin, issue of Alexander Loppin, Jeannette, Edward and Irene Loppin, issue of Edouard Loppin." After the death of the testator the house was sold and the amount realized therefrom by the executors was adequate to pay only a part of the legacies. Subsequently an action was brought by the legatees, within three years from the granting of the letters testamentary to the executors, to partition certain lands acquired by the testator subsequent to the making of the will, as to which he died intestate.

Held, that the real estate, as to which Alexander Loppin died intestate, was not chargeable with the legacies in question;

That as it was evidently his intention that the proceeds of the house mentioned in the will should be appropriated to the payment of the legacies, the debts of the testator, which his personalty was insufficient to pay, should be charged upon the other real estate sought to be partitioned; but that before they could be deemed a lien thereon, or any part of the proceeds of such other real estate could be appropriated to their payment, the debts must be proved in the Surrogate's Court.

APPEAL by the defendants, Jeannette Loppin and others, infants, by their guardian ad litem, William D. Rice, Jr., from so much of an interlocutory judgment of the Supreme Court in favor of the plaintiff and certain of the defendants, entered in the office of the clerk of the county of New York on the 12th day of April, 1897, upon the decision of the court, rendered after a trial at the New York Special Term, as adjudge, in an action brought for the partition of certain real estate, that their share is charged with certain debts of their testator, Alexander Loppin, deceased.

Paul N. Turner, for the appellants.

George Putnam Smith and *H. A. Vieu*, for the respondents.

PARKER, J.:

This action was brought to partition certain lands as to which Alexander Loppin died intestate. He left a last will and testament, which was executed some time before he acquired the property which is the subject of this controversy, by which, among other things, he gave to each of his three children the sum of \$10,000, and directed that, after a year, the house in which he lived, and which was the only real estate then owned by him, should be sold at public auction, "and, after paying the sum as before said, the balance to be divided into five equal part between the survivors or their issue, the said Aimee Bell, Heloise Loppin, Albert Loppin, Alice Loppin, issue of Alexander Loppin, Jeannette, Edward and Irene Loppin, issue of Edouard Loppin." The house has been sold by the executors in obedience to the mandate of the will, the sum realized therefrom being about \$20,000. As this sum is inadequate to pay more than about two-thirds of the legacies, the legatees in this action claim the right to have the proceeds of the real

estate in question applied towards the payment of their legacies, after the payment of the costs of the action and the debts of the intestate. The judgment so provides, but it cannot be sustained.

The personalty is the primary fund for the payment of legacies. If the proceeds thereof, after taking therefrom the expenses of administration and the sum necessary to pay the debts of a deceased, prove insufficient to pay the legacies in full, then the legacies must be paid proportionately, unless it appears upon the face of the will, or from the will read in connection with the surrounding circumstances, that it was the intention of the testator that the payment of the legacies should be charged upon the whole, or some part, of his real estate. The intestate intended that the house in which he lived, and the only house which he owned at the time of the execution of the will, should be used in payment of the legacies. He ordered his executors to sell it and to apply the proceeds to that purpose, so far as the same should be needed. But as to the real estate now in controversy, there is no indication in the will of an intention to have the payment of the legacies made a charge upon it. Indeed, he did not own it at that time, nor does it appear that he then contemplated owning it or any other real estate. There is no foundation, therefore, for that portion of the decree which adjudges the legacies to be a charge upon the premises, and it should be modified accordingly.

The appellants also insist that the proceeds resulting from the sale of the house, out of which the testator directed the legacies to be paid, are chargeable, in the first instance, with the payment of the testator's debts. But we agree with the conclusion reached by the trial court, that it was the intention of the testator to appropriate the proceeds of the house and lot mentioned in the will to the payment of the legacies; and if, at the time of his death, the personalty was insufficient for that purpose, then such other real estate as the testator had should, in the first instance, be appropriated to the payment of his indebtedness.

The decree further provides that after the payment of the costs, referee's fees, expenses of sale, taxes, assessments, water rates, insurance, liens established before the death of the said decedent, and the debts hereinbefore referred to, the rest of the money should be deposited with the city chamberlain to the credit of the parties

entitled thereto, to await the further order in the premises, for the reason that the action has been brought before three years have elapsed after granting letters of administration upon the estate of said decedent, Alexander Loppin. In so far as this provision of the decree authorizes the payment of the claims which the decree assumes have been duly presented to the executors and proved, it was error. This question was passed upon by the Court of Appeals in *Hogan v. Kavanaugh* (138 N. Y. 417). That was an action in equity to have certain legacies declared a charge upon land, and in which it was made to appear that the personalty was insufficient to pay the creditors. The judgment rendered by the trial court adjudged the legacies to be a charge upon land, provided for its sale, and directed that the proceeds be applied, *first*, to the payment of the debts of the testator and, *second*, to the payment of legacies. The Court of Appeals modified the judgment so as to provide for the sale of real estate for the payment of legacies, subject to the right of creditors to be first paid out of the fund after, but only after, the debts had been duly established in Surrogates' Courts and such proceedings had as would authorize the sale of real estate for the payment of debts. The court said (p. 422): "But the right of the creditor to resort to the real estate of his deceased debtor did not exist at common law, nor was collection of debts from real estate ever regarded as part of the jurisdiction of equity. That right was conferred by statute, and it must be asserted and proved in the manner that the statute prescribes. * * * It is sufficient to say that a court of equity is not the tribunal appointed by law to administer upon the estates of deceased persons, and that part of the judgment in this case which voluntarily provides for the sale of real estate of the testator for payment of debts cannot be sanctioned without encouraging irregularities and, perhaps, abuses of the gravest kind, and which in the end might seriously affect the rights of parties interested in the estates of deceased persons. There can be no hardship in requiring creditors or their assignees to proceed in the regular way to appropriate real estate to the payment of debts. The statutory procedure is plain in itself, and obscure or doubtful questions have been solved by the decisions of the courts."

The claims of the creditors of the testator have been admitted by

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the executors to be valid claims against the estate, but that fact does not warrant their payment from the proceeds of his real estate. Under the statute, it is necessary that the creditors should establish their claims by competent evidence before a proper tribunal before there can be appropriated to their payment any part of the proceeds of a decedent's real estate. And that tribunal the statute declares to be the Surrogate's Court.

The 27th paragraph of the decree should be modified as follows: "*Twenty-seventh.* That as this action has been brought before three years have elapsed from the granting of letters testamentary upon the estate of said decedent, Alexander Loppin, otherwise known as Alexander G. Loppin, from whom plaintiff derives her title, the final judgment to direct that the proceeds of the sale remaining after providing for the payment of the costs, referee's fees, expenses of sale, taxes, assessments, water rates, insurance, liens established before the death of the said decedent, be forthwith paid into the Surrogate's Court by the referee making such sale, pursuant to sections 2798 and 2799 of the Code of Civil Procedure, by depositing the same with the city chamberlain of the city of New York."

As thus modified the judgment should be affirmed, with costs to these appellants payable out of the fund.

VAN BRUNT, P. J., RUMSEY, PATTERSON and O'BRIEN, JJ., concurred.

Judgment modified as directed in opinion, and affirmed as modified, with costs to appellants payable out of the fund.

DAVID McCLURE, as Receiver of THE LIFE UNION, Respondent, v.
WILLIAM H. LAW, Appellant.

Money had and received — contract by the directors to turn over the control of a corporation to a party paying therefor — an action does not lie against them for money received.

A contract by which the directors of a solvent assessment co-operative life insurance company agree with a third party that, in consideration of the payment by him to them of a bribe of \$15,000, they will turn over to him the entire control of the company, from time to time resign their offices and permit his nominees to be substituted, is wholly void.

Such acts are not done in pursuance of any duty which the directors owe the company, nor are they related to its business or capable of ratification by it, and a receiver of the company subsequently appointed cannot maintain an action as for money had and received to the use of the company, to recover a part of such moneys from one of the culpable directors, as the director cannot in any sense be deemed to have received his share of the bribe for, or as the agent of, the company.

APPEAL by the defendant, William H. Law, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 30th day of January, 1897, upon the verdict of a jury rendered by direction of the court, and also from an order entered in said clerk's office on the 16th day of February, 1897, denying the defendant's motion for a new trial made upon the minutes.

Henry D. Hotchkiss, for the appellant.

David McClure, for the respondent.

RUMSEY, J.:

On the 16th day of June, 1891, the defendant became a director in the Life Union, an insurance corporation organized under the laws of the State of New York upon the co-operative or assessment plan. On the twenty-sixth day of December, in the same year, he became the president of the corporation. A considerable time before that, and in the month of April, 1891, the Life Union had been engaged, through some of its directors, in an effort to obtain control of another insurance company known as the Flour City Life Association of Rochester. To that end an agreement had been made for the purchase by the Life Union of the membership of the Flour City Association. On the 10th of April, 1891, the trustees of the Life Union passed a resolution to execute notes to that corporation to the amount of \$35,000, the proceeds of which were to be used in the purchase of the Flour City Association, and the notes were to be paid from such portion of the income of the Life Union as might properly be applicable thereto. In accordance with this resolution, thirty-five notes of \$1,000 each were made by the officers of the Life Union, eleven of which were subscribed for by persons connected with the corporation, and three of them were taken by the defendant. These notes were utterly void, and were subsequently so adjudged. (*McClure v. Levy*, 147 N. Y. 222.)

After this transaction had been had, the defendant became one of the officers and finally the president of the Life Union, as before stated, and as such, it appears from the testimony, he undertook to make out of his connection with the company a sufficient profit to enable him to recoup the loss of the \$3,000 which he had suffered by subscribing to these invalid notes. To that end he entered into a transaction which is the subject of this action. The facts connected with the transaction do not seem to be disputed.

It appears from the facts shown that at that time the Life Union was in a very solvent condition. As stated by the officers in a circular, signed by this defendant among others, the company had something over \$68,000 in cash and about \$38,000 of unpaid losses, of which a small portion only was due. There seems to have been a large reserve fund, the precise amount of which was not stated, and assessments unpaid sufficient to meet a large portion, if not all, of the expenses and just claims against the company, so that the members of the company had every reason to believe from the statement that its affairs were in a flourishing condition. Such being the condition of the company, it seems that one Mr. Louis P. Levy desired, for his own purposes, to procure the control of it, and for that purpose he made a contract with the defendant, and other members of the board of directors, to the effect substantially that he would pay them the sum of \$15,000, in consideration for which they would resign their offices as directors from time to time, as he might request, and would substitute in their places other persons to be nominated by him, so that he and his creatures might have the entire control of the corporation. The money was to be paid by him in installments, the last of which was to be paid at the time when he obtained the full control of the corporation, and the object of the contract, as stated by the witness, was to deliver to him the absolute control of the Life Union. This agreement was carried out, and the result was that these trustees transferred to Levy the full control of the corporation, whose interests they were bound to protect, and received from him the amount of the consideration which he had agreed to give them. As might be expected, shortly after this transaction was completed the affairs of the Life Union ceased to flourish, and within a few months it went into the hands of a receiver, Mr. Levy

having recompensed himself for his investment by depleting the treasury of the company of all the money that was in it, leaving to the members nothing but the liabilities after he himself had taken possession of the assets. The receiver, who was in consequence appointed, brought this action against this defendant, as well as other actions against other defendants, to recover the money received by them as their share in the transaction. The complaint as framed contained three causes of action. Two of them were for money had and received by the defendant and were based upon the theory that the money which he received from Levy was the property of the corporation, and consequently he was bound to answer to the corporation for the whole of the money, or so much of it at least as he received for his own use. The third cause of action was based upon the theory that the act of the defendant in turning over the control of the corporation to Levy was a breach of trust and that he was liable in damages to the corporation for any injury which it might have suffered by reason of that act. This complaint, in an action against another defendant for his part in the same transaction, was demurred to for the reason that several causes of action were improperly united, and that demurrer was sustained by this court. (*McClure v. Wilson*, 13 App. Div. 274.) The question was not raised there whether the facts alleged in the first two causes of action were sufficient to constitute a cause of action, but the only question was whether, if they did constitute a cause of action, they could be united with the third count of the complaint setting up a cause of action for damages for a tort. Upon the trial the plaintiff was required to elect whether he would proceed upon the first two causes of action set out in the complaint, upon the implied contract for money had and received, or upon the third cause of action, seeking to recover damages for the tort of the defendant in violating his duty towards the Life Union. He elected to proceed upon the first two causes of action, and the trial was continued upon that claim. As, owing to the frankness with which the contract was avowed by all the parties to it, there was no disputed question of fact, the court ordered a verdict for the plaintiff against the defendant for the amount of money which he had confessedly received out of the sum which Levy paid to the directors, and judgment was entered for that sum and interest and costs, from which the defendant takes this appeal.

The theory upon which the plaintiff proceeded upon the trial was clear. It was that Law had received from Levy moneys which were the property of the company, or which the company was entitled to consider as its property, and for that reason the company was entitled to recover the money which had been paid to him in an action for money had and received by him to its use. Upon no other theory could the causes of action set out in the first and second counts of the complaint be sustained, because an action for money had and received will only lie when one has received money of another which he had no right to retain as against that other, but which of right and justice should be paid to the person to whom it belongs. (*Lawson v. Lawson*, 16 Grat. 230.) In such a case the law will imply a contract on his part to repay it; but, unless the circumstances are such that a contract of that nature can be implied, it is quite clear that an action for money had and received will not lie. The theory of the action is either that the money was received by the defendant in the performance of some duty which he owed to the plaintiff, or in payment for some property or property right which the plaintiff owned, or which, as against the defendant it might claim to own, and the plaintiff cannot recover unless he establishes one or the other of these things. Unless the right comes to exist in some of these ways there is no ground for saying that the money received by the defendant was money belonging to the plaintiff. It is quite clear in this case that the money was not received by Law in payment for any property or property right which belonged to the Life Union. The only way then in which this money can be claimed by the Life Union is, that Law, in making the contract by which he received it, was in the performance, as director, of some duty which he owed to the company, and which, if performed, would have entitled the company to receive the money. That necessarily involves the proposition that the thing which he did was one which the corporation itself might have done, and that it has ratified his act so that it has become entitled to regard that act as one done by him in his capacity as agent of the corporation, and, consequently, to claim that the money he received was received as agent and should be paid over to it.

What, then, was the contract that Law undertook to make? It is very plain. It was one which had no relation whatever to the

transaction of any of the business of the company. It was not one which in any aspect of the case the company could have authorized, or he as director could have made. As director of the company he had certain powers and duties with reference to the transaction of business of the company. As to those matters, if he performed them with proper regard for the interest of the company, the company was bound; and if, in performing them, he attempted to secure a benefit for himself, nevertheless the corporation might ratify his agreement and require him to account for the profit he would have made by his contract. But this contract came within neither of these classes. It had only for its object that, for a consideration to be paid to him, he should surrender his position as director and turn the company over to another person to do what he chose with it. He was simply to abandon his position as a trustee and guardian of the interests of the corporation which it was his duty to protect. This could in no sense be said to be a part of his duty as director, nor was it a thing which he could have done in the performance of these duties. It had no relation whatever to the business of the company. It was not a thing which the corporation could have authorized him to do, and consequently it was not a thing which could have been done in performance of the business of the company, and it could not have been ratified by the corporation. It was simply a sale by him of his position as director. It was a violation of the duty which he owed to the corporation, whose trustee he was. It was also utterly void, and without doubt he would be liable in damages to the corporation for any injury which resulted to it from this abdication of his duties and the transfer of the control of the corporation to other persons, by whom it was plundered. But the money he received for it was in no sense the money of the corporation, and there is no way in which it could be transmuted into the money of the corporation, because, as was said, it was not a thing which, as director of the corporation, he could have done in the performance of his business. For this reason, therefore, there can be no foundation for the action for money had and received, which, as we see, depends upon the idea that the money was received in the performance of some act done in the business of the corporation or which the corporation had a right to regard as so done. We have been unable to see

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any principle upon which an action for money had and received could be maintained, nor are we referred to any authority which would enable the plaintiff to recover in the form of action upon which he has decided to rest his claim.

The case of *The Metropolitan Bank v. Heiron* (5 Exch. Div. 319) has been referred to. The question presented in that case does not arise here. In that case Heiron, a director of the Metropolitan Bank, had, by false and fraudulent statements as to the pecuniary position of a debtor of the bank, induced the bank to accept from the debtor the sum of £50 in satisfaction of a claim which they had against him for £3,800. It was alleged that Heiron received from the debtor a bribe of £250, in consideration of which he made the false representations to the bank by which it was induced to compromise the debt for £50; and the action was brought by the bank to recover from Heiron the sum of £250. The plaintiff was defeated in that action because the Statute of Limitations had run against the claim, and the correctness of that ruling was the only question presented to the court. During the argument and in delivering their opinions the judges made use of some expressions from which it might be inferred that if the Statute of Limitations had not run the action might have been maintained, but the general drift of the opinions of the judges was to the effect, stated by BRETT, L. J., that an action at law might lie on the case for the misrepresentations made by the defendant, if they were fraudulently made, and that the loss which the bank suffered through them would be the measure of damages, but he did not understand how this £250 could be recovered at law on the ground that the defendant received it as a bribe. The court, in the argument, drew the distinction between a sum of money received by a director upon some trust connected with the business of the corporation and a sum of money received for a bribe, and which never actually became a part of the funds of the company. But in that case there were grounds upon which a recovery might have been sustained, because the act which the defendant had done in pursuance of the bribe was a thing done directly in the line of his duty as a trustee of the corporation, and if it was fraudulently done it might plausibly be said that the corporation could waive the tort committed upon it and claim from him

the money received by him in the performance of his duty. But that is a different case from the one presented here, because, as we have seen, the thing which Law did in this case had no connection with any business of the corporation. It had no more to do with the business of the corporation than if for a consideration he had agreed to rob the safe of the corporation and turn the money over to a third party, in which case, although the corporation might have an action against him for damages, it could hardly be said that it had an action for money had and received.

These considerations require us to hold that the action in the form in which the plaintiff elected to pursue it at the trial cannot be sustained, and the judgment must be reversed and a new trial ordered, with costs to the appellant to abide the event.

VAN BRUNT, P. J., PATTERSON, O'BRIEN and PARKER, JJ., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event.

DAVID McCLURE, as Receiver of THE LIFE UNION, Plaintiff, v. WAYLAND TRASK, Defendant.

Money paid for a sale of the control of a corporation — it cannot be followed into the hands of the holder of an invalid obligation of the corporation.

Where the directors of an assessment co-operative life insurance corporation agree to and do procure the control of the corporation to be transferred to a party who pays \$15,000 therefor, under whose management the corporation becomes insolvent and a receiver of its property is appointed, the fact that out of such money the directors pay to the holder of an unenforceable obligation of the corporation, who receives it in good faith, the amount thereof, does not render the latter liable to the receiver for the amount so paid.

MOTION by the defendant, Wayland Trask, for a new trial upon a case containing exceptions, ordered to be heard at the Appellate Division in the first instance upon the verdict of a jury in favor of the plaintiff rendered by direction of the court after a trial at the New York Trial Term.

David McClure, for the plaintiff.

Henry D. Hotchkiss, for the defendant.

RUMSEY, J. :

During the year 1891, and for some time before then, the Life Union was a life insurance corporation organized under the laws of the State of New York upon the assessment or co-operative plan. Early in the year 1891 a project was devised by the directors of the corporation of buying the membership of the Flour City Life Association for the sum of \$40,000. To raise a portion of that sum it was resolved by the board of directors to issue the notes of the Life Union in sums of \$1,000 each to the amount of \$35,000, and sell those notes to such persons as should subscribe for them. The notes were accordingly made on the 13th day of April, 1891. Eleven of them were sold to different persons, and the defendant here became the purchaser of one note. These notes were not valid, and those who purchased them were in danger of losing their money because they had no remedy against the Life Union upon them. It does not appear that the defendant knew of the invalidity of the note at the time when it was issued or when he purchased it. At the time of the date of the notes the defendant had no official connection with the Life Union, so far as appears, but he became a director on the 17th of April, 1891. He held that position until the 26th day of September, 1891, when he tendered his resignation to take effect on the first of October, and after that time he appears to have had no further connection in any way with the affairs of the corporation. The transaction for the purchase of the Flour City Life Association dragged along during the summer of 1891, and about the time of the defendant's resignation it apparently fell through, because one of the last acts of the defendant as director seems to have been the proposing of a resolution directing steps to be taken to recover back the money paid to the representatives of the Flour City Life Association for the purchase of that association. Whether anything was done under that resolution does not appear, nor is it of importance.

Some months after the resignation of the defendant, other persons then in the directorship took steps to sell the control of the Life Union to certain persons who desired to obtain it, and several

contracts were made to the effect that, for the sum of \$15,000 to be paid to one of these directors, he would procure the control of the corporation to be transferred to the would-be purchaser, and that a majority of the directors should resign from time to time and the creatures of the purchaser be chosen as directors in their places, so that he, having control of the majority of the board, might work his will upon the funds of the corporation, and without any interference from the persons who had formerly been directors, and who upon this consideration abandoned their trust. This contract, which was first made on the 28th of December, 1891, was finally completed in the month of May, 1892. The control of the corporation was passed over to the purchaser, and the money was paid by him to the director. After that, and presumably out of the funds paid to this director for the purchase of this corporation, the defendant received from him the amount of his note against the Life Union, with interest, and he delivered the note to the director who had sold out the company. The company, which had been flourishing down to the time of this transaction, soon became insolvent, and in the month of November afterwards the plaintiff was appointed receiver. He thereupon brought this action, seeking to recover of the defendant the amount which he had received in payment of his note of the Life Union from the director who sold out the control of the corporation. The action is for money had and received, and the theory upon which it is brought is that the company had the right to regard the money received by the director for the control of the corporation as its money, and to follow it into the hands of any person who received it. It is based upon the idea that the corporation might adopt the transaction and consider the money paid to complete it as a fund belonging to the corporation, and require all persons sharing in that fund to account to the corporation for the portion which they received. There is no other theory upon which the action can be maintained against this defendant. He was not an officer of the corporation at the time when this transaction took place, and there is nothing in the evidence to warrant holding, as a conclusion of law, that he was aware of what was being done, or that he took any part in this bargain by which the company was delivered over to those who could plunder it of its assets. He must be regarded, therefore, upon this motion as a

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person who had honestly received the money which was paid to him upon the note of the Life Union, and he can only be held liable upon the theory advanced by the plaintiff that the money he received was money which in right and justice belonged to the corporation and to which he had no claim.

We have examined the nature of this transaction in the case of *McClure v. Law* (*ante*, p. 459), and we have concluded that the money received by Law as a payment for turning over the control of the Life Union to the purchaser was not money of the corporation and could not in any way be regarded as such, and that the corporation had no remedy against the person receiving the money in an action for money had and received, but its only remedy was by an action to recover damages as the result of the fraud practiced upon it by the directors.

The determination of that case disposes of this action, and it is unnecessary to repeat the reasoning by which that result was reached. Adopting that result, as we must, the necessary conclusion is, that the facts shown upon the trial here did not give to the plaintiff any right to relief against the defendant, and that the exception by the defendant to the direction of a verdict must be sustained and a new trial ordered, with costs to the defendant to abide the event of the action.

VAN BRUNT, P. J., PATTERSON, O'BRIEN and PARKER, JJ., concurred.

Exceptions sustained, new trial ordered, costs to defendant to abide event.

Cases
DETERMINED IN THE
THIRD DEPARTMENT
IN THE
APPELLATE DIVISION,
September, 1897.

ANTHONY H. LAWATSCH, Appellant, *v.* JOHN J. COONEY, Respondent.

Money had and received — action by a grantor against a mortgagee who has required the purchaser to pay a sum (deducted from the purchase price) in excess of the amount due.

Where, on a transfer of real property, the grantor is to receive a fixed sum, less the amount of the liens and incumbrances thereon, he may recover in an action for money had and received from the holder of a mortgage on the premises, the excess, beyond the legal amount due such mortgagee, which he has exacted from the grantee as a condition of satisfying the mortgage, whether the improper exaction resulted from mistake, coercion, misrepresentation or fraud. PARKER, P. J.; dissented.

APPEAL by the plaintiff, Anthony H. Lawatsch, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Ulster on the 10th day of February, 1896, upon the dismissal of his complaint directed by the court after a trial before the court and a jury.

This action was brought to recover, as for money had and received, a sum of money obtained by the defendant under the following circumstances: The plaintiff, who was the owner of certain land, upon which the defendant held a mortgage, sold it, giving the purchaser the right to discharge the liens thereon from the purchase price. The purchaser, upon the assumption that it was due to the defendant, paid him a sum considerably in excess of the mortgage debt, and it is this excess which is sought to be recovered in this action.

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John E. Van Etten, for the appellant.

John J. Linson, for the respondent.

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By the terms of the conveyance of the real estate the plaintiff was to receive from one Relyea, the purchaser, the sum of \$1,400, less the amount of the several liens and incumbrances upon such real estate. Amongst such liens and incumbrances was a mortgage given by the plaintiff and his wife to the defendant for the sum of \$1,600. Payments had been made upon this mortgage by the application of moneys derived from insurance policies, so that, at the time the defendant gave the satisfaction to Relyea, there was due for principal and interest the sum of \$342.16. Relyea paid to the defendant upon such mortgage, upon receiving the satisfaction, and the defendant received, the sum of \$590. This \$590, of course, was paid upon the assumption that the plaintiff owed the defendant that amount upon the mortgage, and the only right that the defendant had to receive the moneys from Relyea was in payment and satisfaction of the plaintiff's debt to him.

It is apparent, then, that the defendant has received more than he is entitled to ; that Relyea, to clear off the incumbrances on the real estate he had purchased, has paid out more than was due upon such incumbrances, and the amount thus paid out has been deducted from the amount of the purchase price of such real estate, from the amount that the plaintiff was entitled to receive, and that the defendant has money in his hands which should have been paid to the plaintiff. It seems to me that the law applicable to this state of facts is stated in the case of *Roberts v. Ely* (113 N. Y. 128, 131), as follows: "Money in the hands of one person, to which another is equitably entitled, may be recovered in a common-law action by the equitable owner upon an implied promise arising from the duty of the person in possession to account for and pay over the same to the person beneficially entitled. The action for money had and received to the use of another is the form in which courts of common law enforce the equitable obligation. The scope of this remedy has been gradually extended to embrace many cases which were originally cognizable only in courts of equity. Whenever one person has in his possession money which he cannot conscientiously

retain from another, the latter may recover it in this form of action, subject to the restriction that the mode of trial and the relief which can be given in a legal action are adapted to the exigencies of the particular case, and that the transaction is capable of adjustment by that procedure, without prejudice to the interests of third persons. No privity of contract between the parties is required, except that which results from the circumstances. (*Mason v. Waite*, 17 Mass. 560.)

"The right on the one side, and the correlative duty on the other, create the necessary privity and justify the implication of a promise by the defendant to do that which justice and equity require. It is immaterial, also, whether the original possession of the money by the defendant was rightful or wrongful. It is sufficient that the duty exists on his part, created by the circumstances, to account for and pay it over to the plaintiff."

Whether this money was received by the defendant through mistake arising from a miscalculation as to the amount due to him from the plaintiff on such a mortgage; or whether, for the purpose of enabling Relyea to remove the liens upon the real estate that had been purchased by him, he coerced him into paying a larger amount than was due, or whether he procured him to pay such sum by misrepresenting the amount that was due, makes no difference; in either event, the defendant received more money than he was entitled to receive; it was in equity the plaintiff's money which was being used to pay his debts, and was paid upon the supposition that the plaintiff owed that amount, and whether received by mistake, inadvertence or fraud, it does not belong to the defendant, but does belong to the plaintiff, and should be paid to him.

It is no answer to say that the plaintiff would have a right of action against Relyea; that Relyea had no right to pay more than was actually due upon the liens and incumbrances upon such real estate, and that the plaintiff could maintain an action against him for the difference between \$1,400 and the amount actually due upon the incumbrances.

It is not necessary for us to decide in this case whether that is true or not, but conceding it to be so, that does not deprive the plaintiff of his right of action against the defendant for the moneys that he has received, that in equity belong to the plaintiff, and that

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he received under the claim or understanding that that amount was due from the plaintiff to him.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concurred, except PARKER, P. J., dissenting.

Judgment and order reversed and a new trial granted, costs to abide the event.

SARAH KIRBY, Respondent, v. THE PRESIDENT, MANAGERS AND COMPANY OF THE DELAWARE AND HUDSON CANAL COMPANY and DELL BROWN, Appellants.

Negligence—explosion of heating apparatus in a part of a hotel used as a railroad depot—the doctrine of res ipsa loquitur inapplicable—failure to inspect it—discrediting testimony elicited from the adverse party.

A passenger injured while waiting in a room in a hotel, temporarily occupied by a railroad company as a depot, by the explosion of the hotel heating apparatus of a kind in common use and from which, if properly operated, no danger was to be apprehended, not controlled by the company, and dangerous merely when a certain valve was improperly operated, has no cause of action against the railroad company nor against the hotelkeeper in the absence of proof of the cause of its explosion or of negligence in its operation.

The doctrine of *res ipsa loquitur* has no application to such a case. The failure of the company to inspect the heating apparatus is not material where such inspection, if made, would not have disclosed the fact that danger was to be apprehended from the apparatus.

A party, upon whom it is incumbent to prove an alleged fact, cannot call his adversary as a witness to prove it, and, after eliciting from him testimony to the effect that such alleged fact has no existence, then call upon the jury to discredit such testimony simply because such witness is interested as a party, and thus base upon the assumed falsity of his testimony an affirmative finding of the existence of such alleged fact, without other evidence thereof or evidence from which it can be inferred.

APPEAL by the defendants, The President, etc., of the Delaware and Hudson Canal Company and Dell Brown, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Rensselaer on the 12th day of Novem-

ber, 1896, upon the verdict of a jury, and also from an order entered in said clerk's office denying the defendants' motion for a new trial made upon the minutes.

This action was brought to recover damages for personal injuries sustained by the plaintiff while waiting, for the purpose of taking passage upon the defendant corporation's railroad, in a room in the defendant Brown's hotel, which was being used by the defendant corporation as a ticket office and waiting room, in consequence of the explosion of a hot water heating apparatus, which had been installed in the hotel.

Lewis E. Carr, for the appellant, the President, Managers and Company of the Delaware and Hudson Canal Company.

John H. Peck, for the appellant Brown.

Charles E. Patterson, for the respondent.

HERRICK, J.:

There was no contractual relation existing between the plaintiff and the defendant Brown at the time of the accident, and he simply owed to her the ordinary care and duty that any person owes to another in the conduct of his business or the care and management of his property. And the mere fact of the explosion, while the apparatus was under the control and management of the defendant, is not, in the absence of any contractual relation, evidence sufficient to charge the defendant with negligence. (*Cosulich v. Standard Oil Co.*, 122 N. Y. 118; *Reiss v. New York Steam Co.*, 128 id. 103.) The action is based upon the alleged negligence of the defendants, and the fact of negligence must be affirmatively established by the plaintiff, either by direct affirmative evidence or affirmative evidence of facts and circumstances from which the inference of negligence may be legitimately drawn.

This burden of proof rests upon the plaintiff all through the case. The evidence here is that the defendant Brown employed a reputable firm, engaged in the business of making and supplying heating apparatus, to put one in his hotel, that the system contracted for was one in common use, and is not a dangerous system. Brown had nothing to do with its construction or installation.

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So far as the evidence shows, there was no defect in the plant except that at times the water overflowed from the overflow tank, but that was not a source of danger, but simply of inconvenience to the defendant Brown in wetting his carpets and the floor and ceiling underneath such tank.

Brown himself made no attempt to remedy that defect, but applied to the firm that constructed and furnished the heating apparatus; they sent a person in their employ who placed in it a valve and gave Brown instructions how to operate it.

The evidence is, that there is nothing inherently dangerous in the valve; that, if properly operated, it is safe; that, if operated and placed in the manner and position that Brown had been instructed it should be operated and placed, no danger was to be apprehended.

Up to this point in the case there is no evidence from which the jury could properly infer negligence on the part of Brown. He had simply contracted with a reputable firm to place a heating apparatus in his house, not an experimental system, but an approved system, and asked them to remedy a defect, which they had done. He had not in anywise meddled with it himself. Is there, then, any evidence of negligence in the operating and management of the apparatus?

It is contended upon the part of the respondent that the defendant was negligent in the operation of the valve; that that prevented the expansion of the water when it became heated, thus causing the explosion. We have seen there was nothing inherently dangerous in the valve itself; it was only dangerous if improperly operated; and if operated in the manner Brown had been instructed to operate it by the man who placed it, it was safe.

It was incumbent upon the plaintiff, if she intended to impute negligence to the defendant in the operation of the valve, to prove it. There must be more than a mere surmise that there may have been negligence on the part of the defendant. (*Morris v. Railway Co.*, 148 N. Y. 182, 185.)

The only evidence upon that subject was given by the defendant Brown, who was called as a witness by the plaintiff. Without recapitulating his evidence, it is sufficient to say that he testified that he operated the valve in the manner and left it in the position he had been instructed to do by the man who placed it.

The plaintiff claims that she is not bound by the defendant's testimony although she called him as a witness, and that the jury was at liberty to reject his testimony, though uncontradicted, because of his being a party. Assuming, but not deciding, that the plaintiff is right in those respects, still the discrediting or rejection of Brown's evidence as to the manner in which he operated the valve, does not affirmatively establish the fact that he was negligent.

If evidence of the explosion alone, made out a *prima facie* case of negligence, and it then became incumbent upon the defendant Brown to show affirmatively proper management of the heating apparatus by him, then the rejection or discrediting of his testimony by the jury would leave the plaintiff's case established.

But here no such burden rested upon Brown, and the rejection of his testimony simply leaves the case without any evidence upon the matter testified to by him.

The rejection of Brown's testimony does not warrant the jury, in the absence of any other evidence, in basing an affirmative finding of fact upon the assumed falsity of his evidence to the contrary.

A party upon whom it is incumbent to prove an alleged fact cannot call his adversary as a witness as to that fact, elicit testimony from him to the effect that such alleged fact has no existence, and then call upon the jury to discredit the evidence of such adversary simply because he is interested as a party, and to base upon the assumed falsity of his evidence an affirmative finding of the existence of such alleged fact, without any other evidence of its existence, or from which it may be inferred.

It follows, from what I have said, that there was no evidence, as to the manner in which the heating apparatus was operated, from which the jury could find negligence upon the part of the defendant Brown, and the judgment as to him should be reversed.

We then come to the consideration of the liability of the railroad company.

The trial court charged the jury that it could not render a verdict against the company unless it also found that there was some negligence upon the part of Brown.

We must, therefore, necessarily assume that the jury found negligence upon the part of Brown, otherwise it would not have rendered a verdict against the railroad company.

And it would follow from the conclusion I have arrived at that there is not sufficient evidence in the case to warrant an affirmative finding of negligence on the part of Brown, that the judgment should also be reversed as to the railroad company without discussing any other aspect of the case; but, inasmuch as this case has already been twice tried, it is perhaps proper to discuss the question of the liability of the railroad company irrespective of the charge of the trial court that the jury could not find a verdict against the company unless it found there was some negligence upon the part of Brown.

Assuming that a contractual relation existed between the plaintiff and the railroad company, still, as the company did not have the control or management of the apparatus which exploded, I do not think the rule of *res ipsa loquitur* applies; and, consequently, the plaintiff must rely upon the ordinary rules and principles applicable to cases of negligence to maintain her action, and must show something more than the mere explosion and resulting injury to her in order to establish the charge of negligence against the defendant railroad, and make it incumbent upon it to show affirmatively proper care and precaution upon its part.

Let us examine then and see if there is anything in the facts in this case that warrant an affirmative finding of negligence against the railroad company.

That portion of the hotel where the railroad sold tickets and the room in which the plaintiff was waiting at the time of the explosion must, I think, be regarded as the railroad company's ticket office and waiting room, and it must be held to the same liability therefor that it would be for an ordinary railway passenger depot.

What is negligence, and what is due and proper caution, depends upon the circumstances of each particular case, and the degree of care required rises with the difficulties and perils of the situation, and the dangers known or reasonably to be apprehended.

A railroad company cannot be held to the same high degree of care and responsibility for its depots as it is for its passenger trains; the dangers to be apprehended and the liability to accidents, and the inability of travelers to guard against or escape them, in the one case are infinitely greater than in the other.

Its duty is to provide a reasonably safe place for the accommoda-

tion of those awaiting the arrival and departure of trains, and to take such precautions for their safety as would naturally occur to ordinarily prudent and careful men, and to guard against such dangers and accidents as are likely to occur or are reasonably to be apprehended by prudent men.

In this case the depot of the railroad company had been destroyed by fire. It sought a temporary place for the sale of its tickets and the reception of those proposing to become passengers upon its trains. The place it so occupied was in a hotel occupied by the family of its proprietor and by guests and travelers. When it went there it is not questioned but what it was a reasonably safe and proper place.

During its occupancy the landlord placed in the hotel a heating apparatus, a system in common use, and which the testimony shows to have been a reasonably safe one, from which no danger was to be apprehended if it was properly operated and controlled.

The railroad company had nothing to do with the installation or operation of such apparatus, which was entirely under the direction and control of the landlord of the hotel, and there was a presumption that he would exercise that degree of care and caution which the safety of his property and of his guests demanded. (*Cosulich v. Standard Oil Co.*, 122 N. Y. 118, 124.)

The testimony seems to indicate that the railroad company paid no attention by inspection or otherwise to the heating apparatus to ascertain whether it was a safe apparatus or properly operated, and the plaintiff claims that in that respect it failed in the duty it owed to the plaintiff and others using its waiting room to see that it was a reasonably safe place.

Assuming that to be its duty, still, unless we can see that such neglect of duty caused or contributed to the injury, the defendant is not made liable thereby. Suppose the defendant railroad had made the most careful inspection, it would have simply found a heating apparatus not dangerous in its character, properly installed, and only dangerous when improperly operated, and that the landlord had been instructed how to operate it, and that, if he followed such directions, it was, so far as known, perfectly safe.

So that the most careful inspection would have failed to disclose anything in the apparatus itself for the most prudent man to guard

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against, and, therefore, no harm can have resulted from a failure to inspect. The only danger to be apprehended was in operating the valve. The defendant railroad had no right to undertake the operation of that itself, and it does not seem to me that it was incumbent upon it, or that it would occur to a prudent man that it was necessary for him to keep constant watch and guard over the operation of that valve himself.

What is proper care and caution and what danger is reasonably to be apprehended, and, therefore, to be guarded against, is not to be gauged by looking backward after the occurrence of the accident. (*Burke v. Witherbee*, 98 N. Y. 562; *McGrell v. B. O. Bldg. Co.*, 153 id. 265, 270.)

In this case it does not seem to me that the danger was either known or reasonably to be apprehended, neither would it have been disclosed by inspection.

When the duty is simply of ordinary and reasonable care and caution, a failure to foresee and guard against an accident which has not occurred before, and which in its character is not such as to naturally occur to prudent men to guard against, is not negligence. (*Hubbell v. City of Yonkers*, 104 N. Y. 434; *Lane v. Town of Hunccock*, 142 id. 510.)

It follows from these views that the judgment against the railroad should also be reversed.

Judgment and order reversed as to both defendants, and a new trial granted, costs to abide the event.

All concurred, except PUTNAM, J., not sitting.

Judgment and order reversed as to both defendants, and a new trial granted, costs to abide the event.

WILLIAM F. WALL, Respondent, v. MERTON L. BEACH, Appellant,
Impleaded with LUCY WALL, as Executrix, etc., of MICHAEL
WALL, Deceased, and Others, Defendants.

Application to be made a party to an action—when it may be granted only on terms.

The provisions of section 452 of the Code of Civil Procedure, to the effect that a person who has an interest in the subject of an action, or in real property the title to which may in any manner be affected by the judgment therein, must, upon application to the court, be made a party to the action, do not prevent the court from imposing terms and conditions on granting the application of an assignee of a mortgage, the assignment of which was made in October, 1896, but not recorded until April, 1897, to be made a party to an action in which the *lis pendens* was filed in November, 1896, it appearing that the assignee had heard about the action in February, 1897, but "did not learn the full facts" until April, 1897, after which latter date and after the action was at issue and noticed for trial, the application was made.

APPEAL by the defendant, Merton L. Beach, from so much of an order of the Supreme Court, made at the Madison Special Term and entered in the office of the clerk of the county of Madison on the 4th day of May, 1897, as imposes certain terms as a condition of permitting him to intervene in the action.

John E. Smith, for the appellant.

M. H. Kiley, for the respondent.

HERRICK, J. :

The appellant contends that, under the provisions of section 452 of the Code of Civil Procedure, his right to be brought in as a party defendant to the action is absolute, and that the court has no power to impose any terms as conditions to his being made a party.

That portion of the section providing that a person who has an interest in the subject of an action, or in real property, the title to which may be affected by the judgment therein, must upon application be made a party to the action, has frequently been considered by the court.

In *Uhlfelder v. Tamsen* (15 App. Div. 436) Mr. Justice RUMSEY, after a thorough review of the cases theretofore decided, arrives at

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the conclusion that the right to be brought in as a party under the circumstances set forth in section 452, is an absolute right and in such conclusion I concur. But neither in the case of *Uhlfelder v. Tamsen* (*supra*), nor in any of the cases reviewed by Mr. Justice RUMSEY in his opinion, was the question considered as to whether a person might not by his conduct preclude himself from asserting his right to be made a party as an absolute right, to be accorded him without terms or conditions, no matter whether his conduct had been such as to prejudice the rights of other parties to the action, causing the loss of evidence by which such rights might be established, or subjecting them to unnecessary expense.

Conceding that section 452 grants an absolute right to a person situated as therein stated to be made a party to a pending action, yet that right is no more an absolute right or more sacred than many others.

I think it needs no citation of authorities to establish the proposition that rights may be lost or waived or the person claiming them estopped from asserting them by his own conduct, especially where such conduct has resulted to the prejudice or injury of others. A person may waive or estop himself from asserting even rights granted and guaranteed by the Constitution. In other words, the most sacred and absolute rights cannot be asserted as such, under any and all circumstances, no matter what the person's conduct has been or how such conduct has affected other parties.

So, it seems to me, that a person may by his conduct estop himself from demanding as an absolute right, free from all terms and conditions, an order making him a party to a pending action.

To put an extreme case as an illustration, suppose a person having an interest such as described in section 452 of the Code, and knowing of the pendency of the action from the beginning, can he wait until that action has reached the Court of Appeals, and then for the first time make his application to be made a party, and must his application be granted as, of a course and of right, with no power in the court to impose any terms or conditions? It seems to me not.

Here the interest of the appellant is as assignee of a mortgage. He received the assignment in October, 1896; he failed to record it

until April 16, 1897. In the meantime this action had been commenced. The appellant's assignor was made a party; there was nothing upon the records to show that the appellant had any interest in the proceedings. If his assignment had been recorded, presumably he would have been made a party to the action.

He claims he first heard about the action in February, 1897, but that he "did not learn the full facts," and did not until he had a conversation with his counsel about April 10, 1897.

The *lis pendens* in this case was filed November 16, 1896; the action was at issue as to all the defendants, and noticed for trial at a Special Term of this court appointed to be held May 4, 1897, when the appellant gave notice of his application to be made a party.

From the printed case it appears that all of the sum of fifty-five dollars, imposed as the terms upon which the order appealed from was granted, except ten dollars, was made up from witnesses' fees, and it was agreed between counsel upon the argument that such was the case.

The order provides that the appellant shall have three days to serve a notice of appearance; that the plaintiff have twenty days thereafter to serve his complaint, and the appellant have twenty days after the service of the complaint within which to serve his answer. And the order further provides that the case go over the then term of the court.

The order being made upon the appellant's motion, and he appealing from only a portion of it, it is fair to assume that the portion not appealed from is what he sought.

The appellant's conduct has resulted in preventing the plaintiff from ascertaining, by an examination of the records, that he, the appellant, had any interest in the action, or was either a necessary or proper party to it, to the expense of preparing for trial, and to a delay for an indefinite time of the trial of the action. If the appellant had recorded his assignment, it would have been notice to the plaintiff that he ought to be made a party; if he had acted promptly when he was first informed of the action, it would have been a warning to the plaintiff not to prepare for trial, except at the peril of having his preparation fruitless.

The appellant, by his conduct, having prevented the plaintiff from ascertaining who were necessary or proper parties to the

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action, delayed him in the ascertainment of his rights, by a prompt trial, and permitted him to go to fruitless expense, I think, is precluded from demanding that he be made a party to the action as a matter of absolute right, free of all terms and conditions, and, while it is a proper case to let him in as a party to assert his interest, he should only be let in upon such terms as will leave the plaintiff, as nearly as may be, in such condition as he would have been had the appellant been diligent instead of derelict in the respects indicated.

The order should be affirmed, with ten dollars costs and disbursements.

All concurred.

Order affirmed, with ten dollars costs and disbursements.

NATHANIEL NILES, Plaintiff, v. MARTIN MATHUSA and THE HINCKEL
BREWING COMPANY, Defendants.

A liquor tax certificate is a chose in action — it is assignable on demand as security for advances — a delivery not necessary — it need not be filed — what laches do not impute fraud.

A liquor tax certificate, issued under the provisions of chapter 112 of the Laws of 1896, having, by statute, a surrender value, passing to personal representatives and being assignable upon certain terms to any corporation, association, copartnership or individual not forbidden to traffic in liquor, must be deemed to be a chose in action; as such it is assignable without delivery to a corporation which has advanced moneys to the licensee in order to enable him to procure the certificate, and such assignment need not be recorded as a chattel mortgage in order to make it valid as against creditors of the licensee.

Where the agreement made is to assign the certificate to the corporation on demand, the demand may be made at the time that an application is made by a judgment creditor of the licensee to procure in supplementary proceedings the appointment of a receiver of his property.

A delay of some seven months, in making a demand of the licensee that he assign the liquor tax certificate, does not establish *laches*, amounting to fraud as against the creditors of the licensee.

SUBMISSION of a controversy upon an agreed statement of facts, pursuant to section 1279 of the Code of Civil Procedure.

The submission in this case sets forth that the defendant Martin Mathusa, on the 6th day of June, 1896, obtained what is known as a \$500 license under the provisions of chapter 112 of the Laws of 1896, authorizing him to traffic in and sell liquors at No. 22 Franklin street in the city of Albany, and under such license engaged in and conducted said business from the time of the issuance thereof down to the 18th of January, 1897. At the time the license was issued the Hinckel Brewing Company furnished said Mathusa the sum of \$283.33 for the purpose of enabling him to obtain the same, and it was agreed that the said Hinckel Brewing Company should have a lien on the certificate and that it should be considered its property until said sum of \$283.33 was paid in full. And said Mathusa thereupon executed the following instrument:

“ALBANY, N. Y., U. S. A., *June 6th*, 1896.

“I hereby agree to assign, transfer and set over to the Hinckel Brewing Company on demand, license numbered 13,795, taken out in my name, for and in consideration of the sum of \$283.33 loaned to me for the purpose of purchasing said license, to be the property of the Hinckel Brewing Company; and until sum of \$283.33 is paid in full the license is the property of the said company.

“MARTIN MATHUSA.”

The plaintiff on or about the 1st day of December, 1896, obtained a judgment against the defendant Mathusa for \$160 damages and costs, which at said time was duly docketed in the county of Albany; execution was issued on said judgment on the 1st of December, 1896, and returned unsatisfied. On the 2d day of December, 1896, the plaintiff procured an order in supplementary proceedings, and the defendant Mathusa was afterwards examined thereunder. On the 9th day of January, 1897, an application was duly made for the appointment of a receiver of the property of said judgment debtor. On the application Mathusa and the Hinckel Brewing Company claimed that the liquor tax certificate issued as aforesaid to Mathusa was not his property, but belonged to the Hinckel Brewing Company by virtue of the oral agreement and the assignment above set out.

The court before whom the proceedings were had appointed a receiver of the property of Mathusa, but permitted him to transfer

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and deliver the liquor tax certificate in question to the Hinckel Brewing Company.

The question submitted is whether or not, under the facts above stated and the assignment above set forth, a valid legal or equitable assignment of the liquor tax certificate was created in favor of the Hinckel Brewing Company, superior to the lien of the plaintiff by virtue of his judgment, execution and supplementary proceedings.

H. A. Peckham, for the plaintiff.

J. Murray Downs, for the defendants.

PUTNAM, J. :

Under the provisions of chapter 112 of the Laws of 1896, the defendant Mathusa, by the liquor tax certificate issued to him, obtained the right to sell and traffic in liquor at his place of business in the city of Albany. By section 25 of the act, if thereafter he should choose to discontinue the traffic, he was authorized to surrender the certificate, and was thereupon entitled to receive a *pro rata* amount of the tax paid for the unexpired term. If a receiver or assignee should thereafter be appointed of his property, or he should die and an executor or administrator of his estate should be appointed, such receiver, assignee, executor or administrator could surrender such certificate and receive the cash value thereof for the unexpired term ; or, under certain restrictions and regulations, could continue the same business on the same premises. By section 27 of the act Mathusa could sell, assign and transfer the tax certificate to any corporation, association, copartnership or individual not forbidden to traffic in liquor under the provisions of the act. Although under this section the assignee could not continue to carry on the business of trafficking in liquor without the consent of the officer who issued the certificate, or his successor, under the provisions of sections 27 and 28 of the act, such consent could not be arbitrarily refused. If the assignee was not forbidden to traffic in liquors under the provisions of the act or under the subdivision of section 11, under which the certificate was issued, it cannot be doubted but that he had a legal right to the consent of the officer who issued the certificate, and that the giving of such consent would be directed by the court under the provisions of section 28 of the act.

Under the provisions of the statute we see no reason to doubt that the defendant Mathusa could sell and assign his interest in the liquor tax certificate in question, either absolutely or in the way of a security for the money advanced by the Hinckel Brewing Company to enable him to procure the license. Although, to enable the latter as an assignee to carry on the business under the certificate, it was necessary for it to obtain the consent of the officer who issued the same, yet the assignment must necessarily precede such consent. And if such consent to an assignment was necessary when, as in this case, the assignee merely desired to surrender the certificate and recover the cash value thereof, as we have seen, it could not be arbitrarily refused, but under the provisions of section 28 the officer who issued the same could be compelled to grant it.

It cannot be doubted but that the liquor tax certificate in question conferred upon the defendant Mathusa a property right. This is conceded by the parties. It was a right not only to do business, to sell and traffic in liquors at his place of business in the city of Albany, but also, under certain circumstances, a right for him, his assigns, executors or administrators, to recover a certain sum from the State.

Under the contract between Mathusa and the State the former would not be entitled to recover of the latter the surrender value of the certificate unless he should thereafter discontinue the business of trafficking in liquors. The right given to Mathusa under the certificate to receive from the State, under certain circumstances, the *pro rata* amount of the tax paid for the unexpired term, was, therefore, a contingent one. We think, however, the assignment made by Mathusa to the Hinckel Brewing Company valid. It is a well-settled principle that "courts of equity will support assignments, not only of *choses in action* and of contingent interests and expectancies, but also of things which have no present, actual or potential existence, but rest in mere possibility; not, indeed, as a present, positive transfer, operative *in presenti*, for that can only be of a thing *in esse*, but as a present contract, to take effect and attach as soon as the thing comes *in esse*." (Story's Eq. Juris. § 1040; *Williams et al. v. Ingersoll et al.*, 89 N. Y. 508; *Harwood v. La Grange*, 137 id. 538; *Holmes et al. v. Evans et al.*, 129 id. 141; *Fairbanks v. Sargent*, 104 id. 108; S. C., 117 id. 320.)

It is urged by the plaintiff that the assignment under which the Hinckel Brewing Company claimed is in the nature of a mortgage, and, not having been filed, was void as to creditors. In *Booth et al. v. Kehoe et al.* (71 N. Y. 341), where an instrument transferring a lease as a security for a debt was considered, MILLER, J., referring to the provisions of the statutes requiring the filing of a chattel mortgage, said: "They relate to goods and chattels which can be removed from one place to another, and the possession thereof changed, and not to chattels real, or a chose in action." In *Harrison v. Burlingame* (48 Hun, 212) it was decided that the statute in relation to the filing of chattel mortgages did not apply to a mortgage of a mortgage. The same doctrine was stated in *Freeman v. Rich* (64 Hun, 478), of an assignment of accounts as security for a debt. (See, also, *Fairbanks v. Sargent, supra*; *Williams et al. v. Ingersoll et al., supra*.)

The learned counsel for the plaintiff urges that the right of one having a liquor tax certificate to recover its surrender value is not a chose in action; that when the license was issued "a tangible piece of property, capable of actual transfer and reduction to possession, came into existence;" that its surrender value could not be recovered without a surrender of the certificate; it could not be assigned without a delivery; that the right of a licensee under the statute in question is so intimately associated with and dependent upon the paper or written tax certificate delivered to him by the officers of the State, that such paper itself must be deemed the property obtained by the licensee, and a chattel.

We are unable to accede to this view. We regard the right of Mathusa, under the certificate granted to him, to be paid the *pro rata* amount of the sum paid on obtaining a license, as in the nature of a chose in action. In *People ex rel. Stanton v. Tioga C. P.* (19 Wend. 73, 75) COWEN, J., defines a chose in action as "not only a demand arising on contract, but also on wrong or injury to the property or person." In 3 American and English Encyclopædia of Law, 235, a chose in action is defined as "a right of proceeding in a court of law to procure the payment of a sum of money." The demand of Mathusa under his certificate to a rebate arose under a contract between him and the State. The payment of the sum to which he was entitled on the surrender of his certificate could be

enforced by legal proceedings. It does not matter what form of action or legal proceedings he might be compelled to adopt to enforce his demand. He or his assignees, under his contract with the State, had the right to demand payment of a certain sum of money, which right he could enforce by mandamus or other legal proceedings. This right was in the nature of a chose in action, and not the less so because he or his assigns would only be entitled to exercise that right on discontinuing the sale of liquors under the license.

What Mathusa in effect assigned to the Hinckel Brewing Company was not so much the paper given the former by the State, but the rights derived by him under that paper — the right to traffic in liquor, and a right to a rebate on the discontinuance of that traffic. It was no more the assignment of a chattel than the assignment of the lease considered in *Booth et al. v. Kehoe et al.* (*supra*), or the assignment of the mortgage referred to in *Harrison v. Burlingame* (*supra*). In the case last cited the right of the mortgagee was derived from and dependent upon the written indenture of mortgage just as much as Mathusa's right to traffic or to a rebate upon discontinuing such traffic was dependent upon the certificate. If the mortgagee in the case cited had sold the mortgage, a delivery of the instrument would have been necessary, and on the foreclosure and collection thereof he would have been compelled to surrender the security. As in the case cited, the mortgagee was secured certain rights under the written indenture of mortgage, so Mathusa, under the written tax certificate in question, was secured the right, under certain circumstances, to be paid the surrender value thereof.

It is claimed that the agreement to assign is conditioned upon demand; that no demand has been made and hence no lien is created. The plaintiff under his judgment, execution and the proceedings he has taken, only took such right in the certificate in question as Mathusa had at the time. Mathusa's right was subject to the claim of the Hinckel Brewing Company under the oral and written contract admitted in the submission. A demand under said contract could be made at any time. It is made now.

It is also urged that the said company has been guilty of such *laches* in enforcing its lien as to show fraud. We are of opinion, under the circumstances of the case, that the mere delay of the

company in enforcing its equitable rights is not enough to charge it with fraud, although it is true that such delay, under other circumstances and in connection with other facts, might tend to indicate a fraudulent intent. But there are no other circumstances shown to substantiate the charge of fraud. It is conceded that the defendant, the Hinckel Brewing Company, advanced \$283.33 to enable Mathusa to obtain the certificate, and that it has not been repaid that sum. We do not feel justified in holding that the mere delay of the company in collecting the sum it had advanced is sufficient to indicate a fraudulent intent on its part, or that, under all the circumstances, the creditors of Mathusa have been injured by the action of the Hinckel Brewing Company in the matter.

We, therefore, conclude that the defendants are entitled to a judgment for the relief demanded, with costs.

All concurred.

Judgment for defendants for relief demanded, with costs.

In the Matter of the Application of JAMES D. WALSH, Appellant,
for a Writ of Mandamus *v.* THE BOARD OF SUPERVISORS OF
ALBANY COUNTY, Respondent.

A county clerk cannot be allowed by the board of supervisors for money paid to his assistants in assorting jury slips—proof required under the County Law that the money was necessarily expended.

The direction contained in section 3280 of the Code of Civil Procedure, that "Each clerk of a court must perform all duties required of him, in the course and practice of the court, without fee or reward except as expressly prescribed by law," is not affected nor repealed by the subsequent passage of subdivision 9 of section 230 of "the County Law" (Chap. 686 of the Laws of 1892), enumerating, among county charges, "the moneys necessarily expended by any county officer in executing the duties of his office in cases in which no specific compensation for such services is provided by law."

The word "services" in the latter act must be deemed to refer only to such services as a county clerk was authorized to charge for under the law existing when the County Law was enacted, and consequently a county clerk is not entitled to have allowed to him by the board of supervisors, as a county charge, moneys which he paid to his assistants for assorting and arranging jury slips.

The services which a public officer is directed to perform himself, as distinguished from those which he cannot, in the nature of the thing to be done, personally perform, considered.

In cases falling within the provisions of the County Law the claimant must establish the fact, before the board of supervisors, that the money claimed was "necessarily expended" by him.

APPEAL by the relator, James D. Walsh, from an order of the Supreme Court, made at the Albany Special Term and entered in the office of the clerk of the county of Albany on the 23d day of March, 1897, denying his application for a peremptory writ of mandamus directing the board of supervisors to assemble, consider, audit and allow the relator's claim.

James W. Eaton, for the appellant.

Eugene Burlingame, Marcus T. Hun and Learned Hand, for the respondent.

PUTNAM, J. :

This is an appeal from an order of the Special Term of this court entered in Albany county on the 23d day of March, 1897, denying relator's motion for a peremptory writ of mandamus.

At a meeting of the board of supervisors of Albany county in 1896, the relator presented a claim, containing, among other items, one of fifty-two dollars and fifty cents for services in assorting and arranging jury slips, etc., by the county clerk of said county. The affidavit of the relator, presented on the motion, set forth that he actually and necessarily paid said sum of fifty-two dollars and fifty cents to his assistants in performing said services.

The motion was denied in the court below on the ground that the claim set forth in the application was not a county charge — as a matter of law and not of fact.

It is conceded that the services of the appellant or his assistants in assorting and arranging jury slips in the jury box, and taking therefrom the names of the jurors, for which he sought compensation from the county of Albany, were performed in pursuance of a duty imposed upon him by statute, and that no fee or compensation was prescribed by law for such services. Hence, under the provisions of section 3280 of the Code of Civil Procedure, which provided that: "Each clerk of a court must perform all the duties required of

him, in the course and practice of the court, without fee or reward, except as expressly prescribed by law. Each public officer, upon whom a duty is expressly imposed by law, must execute the same without fee or reward, except where a fee or other compensation therefor is expressly allowed by law," the determination of the board of supervisors of Albany county disallowing the claim, must be deemed correct, unless some subsequent or other statute leads to a different conclusion.

It is urged by the learned counsel for the appellant that, under the provisions of a subsequent statute, the said claim of relator was a legal county charge. Section 230, chapter 686, Laws of 1892, known as "The County Law," enumerates county charges, and subdivision 9 of that section states as among county charges "the moneys necessarily expended by any county officer in executing the duties of his office in cases in which no specific compensation for such services is provided by law."

The question for our consideration is whether the determination of the board of supervisors disallowing the relator's claim was or was not erroneous. Under the statute last quoted, giving it the construction claimed by the appellant, he could not call upon the supervisors to audit his demand as a county charge unless he made it appear to the board that it was for money *necessarily expended* in the discharge of the duties of his office. It was not enough for him to prove that he had paid out the amount claimed to assistants to perform services it was his duty to perform. Before he could call upon the supervisors to allow the amount of such disbursement, he was compelled to show that the money so paid was *necessarily expended*. On examining the papers submitted to the supervisors, we are unable to find that the relator submitted any such proof. He did show that he had expended fifty-two dollars and fifty cents for assistants in performing the work in question, that the work performed by said assistants was worth the sum charged, but he failed to prove that the money was *necessarily expended*. Under any construction of the statute in question he should have submitted proof to the board that the work performed by his assistants was work that he could not personally do, and hence that the sum he paid was a necessary disbursement. In the absence of such proof before the board of supervisors, we cannot say that its deter-

mination was erroneous. The board, on the papers presented, having properly disallowed the claim in question, under well-settled principles, a peremptory writ of mandamus cannot issue to compel it again to consider the bill.

It is stated in the moving papers "that there was no consideration by the committee or the Board of Supervisors of said charge of \$52.50, with reference to its being excessive, or for services not rendered." But it is not shown that the board did not consider the question as to whether or not the disbursement for which the relator claimed to be allowed was necessarily made, or the fact that there was an absence of proof that it was so made. In making its decision the board must be presumed to have passed on that question; to have decided that, in the absence of evidence showing that the disbursement in question was necessarily incurred, it was not a legal charge.

But we are inclined to take a different view from that of the learned counsel for the relator as to the construction which should be given subdivision 9, section 230, chapter 686 of the Laws of 1892. When the law was passed, section 3280 of the Code of Civil Procedure was in force, which provided that the county clerk should perform the duties required of him, without fee or reward except provided by law. If the construction of appellant is correct, the wise provisions contained in section 3280 of the Code are in fact repealed by the provision of subdivision 9, section 230 of the County Law.

It is true that the said last-mentioned statute is capable of being construed to mean that a county clerk can hire assistants to perform the manifold duties imposed upon him by statute for which no specific compensation is given, and collect the amount from the county; in other words, that he can collect as a county charge what he pays assistants for doing his own work. But we think the statute in question should not be given such a construction. It should not be deemed to repeal the provision contained in section 3280 of the Code of Civil Procedure. "A statute may sometimes be regarded as being repealed by reason of its inconsistency with a subsequent statute and by implication; but repeals by implication are not favored in the law, and it is only in cases where the repugnancy is clear and manifest, and the two statutes cannot be reconciled or stand together, that this rule can be applied." (*Mark et al. v. The*

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State, 97 N. Y. 572, 578.) The two statutes, we think, can stand together.

In the discharge of the duties of his office the county clerk may be frequently called upon to employ assistants to perform services that he is not expected to and cannot personally perform. For instance, he may be called upon to defend or prosecute a proceeding by mandamus or other action as a public officer, and in such proceeding or action may necessarily employ the services of attorneys. He may be compelled to remove his office or to enlarge it, or increase its accommodations, and for that purpose necessarily expend money for the services of laborers or mechanics. In the discharge of the duties of his office, it is evident that he will frequently, necessarily, be compelled to expend moneys for the performance of services which he is not required by statute to personally perform. We think subdivision 9, section 230 of the County Law, refers to disbursements necessarily expended for such services, and not money paid for work which it is the duty of the clerk to perform himself. Under the provisions of the statute in question, the word "services" should be deemed to refer to such as the county clerk was authorized to charge for under the law existing when said statute was enacted, and not such as it was his duty to perform without fee or reward. The Legislature, in providing in the County Law that money necessarily expended by a public officer for services in executing the duties of his office, where no specific compensation therefor is made by law, should be a county charge, should be deemed to have had in view not those services required of the officer under the law then existing, but to other necessary services which the officer could not do, or was not expected to personally perform. The Legislature did not intend to provide that money paid by a public officer to assistants to do his own work should be considered as necessarily expended.

Reaching the conclusion, therefore, that the claim of the relator was not shown in the papers presented to the board of supervisors to be a county charge, and was not in fact such, and without considering other questions raised in the case, we conclude that the order should be affirmed, with ten dollars costs and disbursements.

All concurred.

Order affirmed, with ten dollars costs and disbursements.

THE PEOPLE OF THE STATE OF NEW YORK, Appellant, v. SAMUEL K.
HAWKINS, Respondent.

Interstate commerce — an ordinary scrub brush, made by convict labor in Ohio and not branded to that effect, may, notwithstanding chapter 931 of 1896, lawfully be possessed and sold in the State of New York — limits of the police power of a State.

Chapter 931 of the Laws of 1896, providing that all goods made by convict labor before being exposed for sale or sold, shall be labeled, marked or branded as specified in the act, and section 384b of the Penal Code, making a violation of such requirement a misdemeanor, do not justify the indictment of a person for having in his possession in the State of New York, for the purpose of sale, and of selling, a certain scrub brush "of the form, style and material commonly used in scrub brushes," manufactured by convict labor in the State of Ohio, not labeled, marked or branded as required by the statutes of the State of New York, but recognized as property in the State of Ohio, and not claimed to be an inferior or deceptive article.

Such a scrub brush is an article of commerce, protected by the interstate commerce clause of the United States Constitution, and neither its possession nor its sale can be affected or controlled by the exercise of the police power of a State; such power only extends to property which does not belong to commerce.

APPEAL by the plaintiff, The People of the State of New York, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Broome on the 23d day of February, 1897, upon the decision of the court sustaining the defendant's demurrer to the indictment.

Chapter 698 of the Laws of the State of New York of 1894 provided that any person having in his possession for the purpose of sale, or offering for sale, any convict-made goods *manufactured in any State other than the State of New York*, without being branded or labeled as specified in the act, should be guilty of a misdemeanor. This statute was repealed by chapter 931 of the Laws of 1896, which provides that *all goods* made by convict labor (which included those made in the State of New York), before being exposed for sale or sold, shall be labeled, marked or branded as in the act mentioned. And by the last-named act, section 384b of the Penal Code was amended so as to provide that any person having in his possession for sale, or offering for sale, any convict-made goods, without being so branded, marked or labeled, shall be guilty of a misdemeanor.

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The defendant was indicted by the grand jury of Broome county on the 25th day of November, 1896, for an alleged offense under the provisions of the act of 1896. In the indictment he was charged with having on the 5th day of November, 1896, in his possession for the purpose of sale and selling a certain scrub brush, "*which said scrub brush was of the form, style and material commonly used in scrub brushes,*" and was manufactured by convict labor in Cleveland, in the State of Ohio, and did not have thereon or attached thereto any label, mark or brand as required by the act in question.

The defendant demurred to the indictment on the ground that the facts stated therein did not constitute a crime. The demurrer was sustained by the court below, and from the judgment entered upon its decision this appeal is taken.

It is claimed by the respondent that chapter 931, Laws of 1896, as far as applicable to the sale by the defendant of a scrub brush manufactured by convict labor in the State of Ohio, is repugnant to the interstate commerce and other provisions of the Constitution of the United States, and also to that portion of the Constitution of the State of New York which provides that "no person shall be * * * deprived of * * * property without due process of law." (Art. 1, § 6.)

On the part of the appellant it is urged that the act under consideration was properly enacted under the police power of the State.

Harry C. Perkins and *Jas. A. McCormick*, Deputy Attorney-General, for the appellant.

Frederick Collin, for the respondent.

PUTNAM, J. :

The defendant was indicted for having in his possession for the purpose of sale and selling "a certain scrub brush, which * * * was of the form, style and material commonly used in scrub brushes," manufactured by convict labor in the State of Ohio, and which was not branded as required by the provisions of chapter 931, Laws of 1896. It was not alleged in the indictment that the brush was not a good one; was not the same in all regards as that made by other

than convict labor; it does not appear that it was not a merchantable article — an article of commerce. It cannot be doubted that, unless the act we are called upon to examine on this appeal can be sustained as a valid exercise of the police power of the State, it must be condemned as a violation of the provisions of the interstate commerce provision of the National Constitution.

Under this statute a citizen of Ohio purchasing or coming into possession of property recognized as such by the laws of that State — an article of commerce — is prohibited from offering for sale or selling the same in this State. A citizen of this State going to Ohio, purchasing such property and returning with it, is likewise prohibited from disposing of it. The act is, in fact, prohibitory. The property *as purchased* in another State cannot be sold here without rendering the vendor liable to a criminal prosecution. It is true if he is able to ascertain the prison in which, and the time when it was manufactured, he may, by changing the article, by branding it, be allowed to offer it for sale; but he cannot dispose of it in the condition it was in when it came into his possession. In *People v. Hawkins* (85 Hun, 43) the provisions of chapter 698, Laws of 1894, were considered. The act was held to be unconstitutional because it discriminated between convict-made goods of other States and those made in the State of New York. In that case (p. 45) MARTIN, J., said: "Commerce among the States cannot be said to be free when a commodity is, by reason of its foreign manufacture, subjected by a State Legislature to discriminating regulations or burdens. The main object of commerce between the States being the sale and exchange of commodities, the policy that interstate commerce should be free and untrammelled would be defeated by discriminating legislation like that of the act in question." Although in the case cited the decision was placed upon the ground that the act therein considered discriminated between convict-made goods of other States and those of New York, yet it must be deemed an authority to sustain the proposition that a scrub brush manufactured by convict labor in the State of Ohio is an article of commerce under the provisions of the interstate commerce clause of the National Constitution, and that chapter 931 of the Laws of 1896, as far as it applies to such property, is a restriction, a burden upon commerce between the States.

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Can the act in question, therefore, as far as it applies to convict-made goods in other States, be sustained? As we have seen, it is in effect prohibitory. It prevents the sale of such foreign convict-made goods unless changed and branded. The act certainly imposes a restriction upon the disposition of convict-made goods of foreign manufacture.

In *In re Ware* (53 Fed. Rep. 783) the defendant was committed to jail in the State of Minnesota for selling baking powder containing alum manufactured in another State without being marked with the words, "This Baking Powder Contains Alum," as required by the laws of Minnesota. It was held that "baking powder is a well-known article of commerce among the States. It belongs to commerce. The sale of an article imported from another State is a part of interstate commerce, and may not be prohibited or burdened by the Legislature of the States." The same doctrine is stated in *In re Sanders* (52 Fed. Rep. 802); *Ex parte Kieffer* (40 id. 399); *Voight v. Wright* (141 U. S. 62). It will be observed in the case last cited, as in the case of *The People v. Hawkins* (*supra*), the decision was placed upon the ground that the act held to be unconstitutional was a law discriminating between the products of different States. But, as we understand the authorities, a State law, the effect of which is to restrict, burden or prohibit interstate commerce, is void, although by its terms made applicable to the State whose Legislature enacts it. In *Brimmer v. Rebman* (138 U. S. 78) a statute of the State of Virginia declaring it to be unlawful to offer for sale any beef, veal or mutton from animals slaughtered 100 miles or more from the place where it is offered for sale, unless it has been previously inspected and approved by local inspectors, was held to be void as being in restraint of commerce, and in the opinion (p. 82) the following language is used: "Nor can this statute be brought into harmony with the Constitution by the circumstance that it purports to apply alike to the citizens of all the States, including Virginia, for, 'a burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute.'" The same doctrine was stated in *Robbins v. Shelby Tax-*

ing District (120 U. S. 489); *Minnesota v. Barber* (136 id. 313); *Bowman v. Chicago, etc., Railway Co.* (125 id. 465, 496).

In *Robbins v. Shelby Taxing District* (*supra*) it is said: "It is strongly urged, as if it were a material point in the case, that no discrimination is made between domestic and foreign drummers — those of Tennessee and those of other States; that all are taxed alike. But that does not meet the difficulty. Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the State. This was decided in the case of *The State Freight Tax* (15 Wall. 232)."

Under the authorities above cited, chapter 931, Laws of 1896, the effect of which was to prohibit or to cast burdens upon the introduction into this State of a lawful article of commerce, is a violation of the interstate commerce clause of the National Constitution, unless the act can be sustained as an exercise of the police power of the State.

In considering this branch of the case we should bear in mind the well-settled doctrine that "the police power cannot be set up to control the inhibitions of the Federal Constitution, or the powers of the United States Government created thereby. (*New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650.)" (*Walling v. Michigan*, 116 U. S. 446, 460; *Brennan v. Titusville*, 153 id. 289, 299; *Matter of Application of Jacobs*, 98 N. Y. 98, 108; *People v. Gillson*, 109 id. 389, 401.)

But although a State cannot under its police power substantially prohibit or burden interstate commerce, it may, for the purpose of protection, in certain extreme cases, enact laws that indirectly affect such commerce. In *Lake View v. Rose Hill Cem. Co.* (70 Ill. 191) it was held that "The police power of the State is co-extensive with self-protection, and is not inaptly termed 'the law of overruling necessity.' It is that inherent and plenary power in the State which enables it to prohibit all things hurtful to the comfort, safety and welfare of society."

In *Crutcher v. Kentucky* (141 U. S. 47, 61), speaking of the police power of the State, BRADLEY, J., said: "But whilst it is only such things as are clearly injurious to the lives and health of the people that are placed beyond the protection of the commercial

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power of Congress; yet when that power, or some other exclusive power of the Federal government, is not in question, the police power of the State extends to almost everything within its borders; to the suppression of nuisances; to the prohibition of manufactures deemed injurious to the public health; to the prohibition of intoxicating drinks, their manufacture or sale; to the prohibition of lotteries, gambling, horse racing, or anything else that the Legislature may deem opposed to the public welfare."

The power of a State to prohibit all things clearly hurtful to the comfort, safety and welfare of society are reserved to it, not ceded to the United States government, and hence not repugnant to the interstate commerce provision in the National Constitution. The true doctrine is well stated in the opinion of CATRON, J., in the *License Cases* (5 How. [U. S.] 504, 599), quoted and approved by MATTHEWS, J., in *Bowman v. Chicago, etc., Railway Co.* (125 U. S. 489-490), as follows, viz.: "The assumption is that the police power was not touched by the Constitution, but left to the States as the Constitution found it. This is admitted; and whenever a thing, from character or condition, is of a description to be regulated by that power in the State, then the regulation may be made by the State and Congress cannot interfere. But this must always depend on facts, subject to legal ascertainment, so that the injured may have redress. And the fact must find its support in this, whether the prohibited article belongs to, and is subject to be regulated as part of, foreign commerce, or of commerce among the States. If, from its nature, it does not belong to commerce, or if its condition, from putrescence or other cause, is such, when it is about to enter the State, that it no longer belongs to commerce, or, in other words, is not a commercial article, then the State power may exclude its introduction. And, as an incident to this power, a State may use means to ascertain the fact. And here is the limit between the sovereign power of the State and the Federal power. That is to say, that which does not belong to commerce is within the jurisdiction of the police power of the State, and that which does belong to commerce is within the jurisdiction of the United States."

The question then arises whether an ordinary scrub brush or other convict-made goods manufactured in the State of Ohio "*belongs to commerce.*" If so, under the authority last cited, such

property is not within the police power of the State. As we have seen, the case of *The People v. Hawkins (supra)* may be deemed an authority that the property, for the selling of which without being branded the defendant was indicted, was an article of commerce within the provisions of the National Constitution. In the absence of any adjudication upon the subject, we are unable to believe that an ordinary merchantable scrub brush manufactured by the authorities of the State of Ohio and placed upon the markets of that State — recognized there as property — not claimed to have been an inferior or deceptive article, was not an article of commerce, because, under the authority of said State, made by convict labor. We think it was property owned by the defendant, and which he had a right to own, possess and dispose of without any restrictions whatever.

Our conclusion is that chapter 931, Laws of 1896, so far as applicable to the defendant, was not within the police power of the State. It was not a statute to prevent or restrain the sale of articles *clearly* injurious to the lives, health or welfare of the People, and hence, under doctrines enunciated in *Crutcher v. Kentucky (supra)*, and other cases above cited, within the reserved powers of the State. Its object was to prohibit or restrain the sale of articles of commerce manufactured by other States and recognized there as such.

We have examined the authorities cited by the learned counsel for the appellant, and are of opinion that they do not conflict with those above referred to. As we have seen, the power of a State to pass police laws relating to the public health, morals, safety or welfare, where the commercial or some other exclusive power of the National government is not in question, is unquestionable. In such cases, as said in *Crutcher v. Kentucky (supra)*, “the police power of the State extends to almost everything within its borders,” while in those relating to interstate commerce, as held in *Bowman v. Chicago, etc., Railway Co. (supra)*, *the police power of a State only extends to property which does not belong to commerce.*

For the reasons above suggested, and without considering other questions raised, we conclude that the judgment should be affirmed.

All concurred.

Judgment affirmed.

DAVID BANKS and A. BLEECKER BANKS, Respondents, v. MARCUS T. HUN, Appellant.

Supreme Court Reporter — his power to contract for the publication of the reports — the nature and reasonable term of such contract — chapter 474 of 1897.

The Supreme Court Reporter has authority, under sections 249 and 250 of the Code of Civil Procedure, to enter into a contract with a publishing firm for the publication and sale to the public, at the price specified in the statute, of the decisions of the Supreme Court for a reasonable time — and five years, the term of office of such reporter, is a reasonable time for the continuance of such a contract.

Such contract is not the contract of the State of New York, but the individual contract of the Supreme Court Reporter, and the Legislature is prohibited by the Constitution from increasing, during its continuance, the burden thereby imposed upon the party contracting with the reporter, by reducing the price at which said party is authorized to sell the volumes of the reports to the public.

APPEAL by the defendant, Marcus T. Hun, from an interlocutory judgment of the Supreme Court, entered in the office of the clerk of the county of Albany on the 1st day of July, 1897, upon the decision of the court rendered after a trial at the Albany Special Term overruling the defendant's demurrer to the plaintiffs' complaint.

The action was brought to compel the defendant, the Supreme Court Reporter, to continue to furnish to the plaintiffs the decisions of the Supreme Court as provided under a contract made between the plaintiffs and defendant for their publication by the former for five years from the 14th day of December, 1895, at the price of two dollars and fifty cents a volume — the defendant having declined to do so unless the plaintiffs would agree to sell the volumes of reports for two dollars a volume, as required by chapter 474 of the Laws of 1897.

Other facts are stated in the dissenting opinion of LANDON, J.

Marcus T. Hun, appellant, in person.

Simon W. Rosendale, for the respondents.

MERWIN, J.:

I concur in the opinion of brother LANDON, so far as he in substance holds that the contract in question was a valid one.

The amendment of 1897 did not affect vested rights. (*People v.*

Supervisors, 67 N. Y. 109; Stat. Const. Law, § 31.) A contract in pursuance of the law as then existing, whether executed or executory, cannot be annulled at the pleasure of the Legislature. (Potter's Dwaris, 477; *Fletcher v. Peck*, 6 Cranch, 87; *Von Hoffman v. City of Quincy*, 4 Wall. 535, 549.) The rule is not changed by the circumstance that the public are interested to some extent in the performance of the contract. (*The Delaware R. R. Tax*, 18 Wall. 206, 225.)

There is no question about the right of the parties to make the contract in question except as to the time it should continue. That was an important element in the business transaction which the law contemplated. No salary was attached to the office of reporter. The compensation for his services and expenses must be obtained from the publication and sale of the books. The success of the undertaking, for the benefit of himself as well as of the public, required a contract for a reasonable time. Upon the facts alleged in the complaint, the conclusion is, I think, a fair one that the term of five years, being the term of the defendant's appointment, was a reasonable time for the continuance of the contract, and must be deemed to be fairly within the contemplation of the statute as then existing. The contract, therefore, was authorized by law and within the protection of the constitutional provision against the impairment of the obligations of contracts.

There is no doubt that the act of 1897, if applicable to the contract, impairs its obligations.

We have not, I think, a right to assume that this contract was in effect between the State and the plaintiffs, and that, therefore, the State had a right to arrest performance and leave the plaintiffs to such remedy as they might have against the State for damages, under the doctrine laid down in *Danolds v. The State* (89 N. Y. 36) and *Lord v. Thomas* (64 id. 107). Those cases related to the construction of public buildings, the property of the State. It was held that the State could stop the work, and leave the contractor to his remedy on the contract for damages.

The contract in question was not in behalf of the State, and the books when published did not belong to the State and it was to pay nothing on account of them or to the reporter for his services. The undertaking of the defendant was an individual one, and if he

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did not furnish to the plaintiffs the material he agreed to furnish, the State was not liable for such default. The defendant, by virtue of his appointment, had certain privileges in regard to a subject-matter in which the public had an interest, and, therefore, the defendant, in consideration of receiving his privileges, was charged with the duty of causing books to be kept on sale at a price not exceeding a certain sum. The defendant, in order to make his privileges remunerative and discharge also the duty imposed upon him, made his contract with the plaintiffs. The contract was in no sense a public one and I fail to see any basis for plaintiffs claiming damages against the State.

The Legislature did not undertake to publish the reports. By the Constitution (Art. 6, § 21) it was bound to "regulate the reporting of the decisions of the courts," and this it assumed to do in the provisions of the Code on the subject. The fact of regulation implies that some one else is charged with the duty of performance.

But it is said that the defendant is under obligation to carry out the law as amended, and should, therefore, withhold performance from the plaintiffs.

If the contract for the five years' term was valid and is not abrogated by the amendment of 1897, the defendant, by means of such contract, and as long as it is carried out by the plaintiffs, has provided in a legal manner for the discharge of the duty imposed upon him, and its burden cannot be increased after he has, in pursuance of law, provided for its discharge.

This is not a case of impossibility of performance, but a question as to what statute should control the performance, or, rather, whether the statute in pursuance of which it was made shall control. In the *Bronk Case* (13 App. Div. 72) specific performance was directed on the part of public officials, although the method of performance, if judged according to legislation subsequent to the contract, was contrary to law.

The plaintiffs, under the allegations of the complaint, are, I think, entitled to have their contract with defendant carried out, and, therefore, the judgment should be affirmed.

All concurred, except LANDON, J., dissenting in opinion and HERRICK, J., not sitting.

LANDON, J. (dissenting):

The complaint alleges in substance that the defendant, the Supreme Court Reporter of the State, acting as such within the power conferred and in pursuance of the duty enjoined upon him by sections 249 and 250 of the Code of Civil Procedure, did, on the 24th day of December, 1895, enter into a contract with the plaintiffs whereby he agreed to furnish them with the manuscript for the Supreme Court Reports, Appellate Division of the State, and they agreed to print and publish the same, as required by section 249, in book form, and keep the same constantly for sale to persons within the State at the price of \$2.50 for a bound volume of not less than 700 pages, that being the maximum price then permitted by section 250 of the Code, the contract to continue for five years from that date; that both parties duly performed until after the amendment of section 250 of the Code, by chapter 474 of the Laws of 1897, whereby the Supreme Court Reporter was required to cause such bound volumes to be sold for \$2 per volume, when the defendant notified the plaintiffs that he should refuse further to perform said contract on his part, unless the plaintiffs would agree to place the bound volumes on sale at \$2 per volume. This the plaintiffs refused to do, but are ready to perform the contract as it is. The complaint sets forth various facts showing that irreparable loss will result to the plaintiffs if the defendant should not perform, and particularly that the parties to this contract, relying upon its performance, entered into another contract of the same date, to continue also for five years, with the reporters and publishers of the Court of Appeals Reports, and of the Miscellaneous Reports, for the publication of the "Combined Official Series of New York State Reports and Session Laws," which contract the parties thereto have hitherto observed and performed, and are ready and willing to continue performing, but which cannot be done except at great loss to the plaintiffs, unless this contract shall also be performed; that the damages to result from non-performance by the defendant of the contract with the plaintiffs are not capable of exact proof.

The plaintiffs pray that the defendant be enjoined from refusing performance, and be enjoined to continue it.

The defendant demurred to the complaint "upon the ground that

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the complaint upon its face does not state facts sufficient to constitute a cause of action."

The Supreme Court Reporter is a constitutional officer. (Const. art. 6, § 2.) Section 249 of the Code of Civil Procedure provides that "he must report and publish such of the decisions at the terms of the Appellate Division or Special Terms of the court as he deems it for the public interest to have reported. * * * He must *prepare* for each volume and *cause* to be published therewith the usual digest, head notes, tables of contents and index." Section 250 provided at the time this contract was made that "The Supreme Court Reporter must cause the reports published as prescribed in the last section, to be kept constantly for sale to persons within the State, at a price not exceeding two dollars and fifty cents for a bound volume of not less than seven hundred pages." By chapter 474, Laws of 1897, section 250 was amended by reducing the price per bound volume to two dollars. The statute contemplates the personal work of the reporter in preparing the material for publication, and the choice of appropriate means to secure the publication of the reports, and to cause them to be kept on sale at a price not exceeding that fixed by section 250. I have the less hesitation in holding that the contract here in question was made by the reporter in his official capacity as an officer of the State, and within the scope of his powers, as a reasonable and proper means to the performance of the duty enjoined upon him, because our familiarity with the products of his labor thus performed, and in like manner performed for many years, enables us to see that what the law would presume, the facts confirm. The contract is, therefore, one between the State and the plaintiffs. But it does not follow that the only course open to the State, acting through its officer and agent, the Supreme Court Reporter, is to continue its performance of the contract on its part for the full period of five years.

If I hire A. to build me a house for \$2,500, and A. commences the work, I may stop him at any stage of it, and his remedy against me is for damages. The same rule applies to the State in its capacity as a contractor. (*Lord v. Thomas*, 64 N. Y. 107; *Danolds v. The State of N. Y.*, 89 id. 36.) I cannot, after the contract is made, require A. to build the house for \$2,000. Unless I stop his

building it, I must pay him the contract price for building it. So the State, which is here represented by the appellant, cannot require the plaintiffs to publish the Supreme Court Reports and place them on sale for less than two dollars and fifty cents per volume, the contract price. Section 250 of the Code of Civil Procedure, as amended by chapter 474, Laws of 1897, now provides that "the Supreme Court Reporter must cause the reports, published as prescribed in the last section, to be kept constantly for sale to persons within the State, at a price not exceeding two dollars for a bound volume." He cannot cause it to be done under this contract; he may possibly cause it to be done under a contract with some other persons; but this would be a breach of his contract with the plaintiffs. The legislative mandate of the State, however, seems to be peremptory; it is no answer to say that the State has inconsistent contract relations with the plaintiffs; if it refuses to perform, it does not violate the obligation of the contract, since, by the payment of damages, it can fully satisfy that obligation, as was held in the cases cited. (*McMaster v. State of N. Y.*, 108 N. Y. 542.) The appellant must, therefore, arrest the performance of this contract, unless the amendment of 1897 can and ought to be construed to apply to future contracts only. It will, of course, apply to future contracts, but there is no reason for its exclusive application to them, except that of the existence of this contract and the supposed desirability of preserving the present system of publishing the reports of the Appellate Division in connection with another contract referred to in the complaint, in some measure dependent upon this one, for the publication of the well-known and, we suppose, generally approved "Combined Official Series." In other words, the refusal by the State to perform this contract threatens to subvert the present system of publishing the reports. This we may regret, but we cannot deny the legislative power, and we can see that the reduction of fifty cents in the price of the reports of the Appellate Division may have been regarded by the Legislature as a full countervailing inducement. The reporter must obey the law as it is. This he proposes to do, and has so notified the plaintiffs, and hence they bring this action to prevent his non-performance, and to compel his performance of it, they being ready and willing to perform upon their part. In this case, as in those cited, the plaintiffs must seek their remedy in damages. We are cited to *Bronk v.*

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Barckley (13 App. Div. 72). There the State did not seek to arrest the performance of its own contract, but of the contract made between certain commissioners acting for the county of Albany, and a contractor for the labor of the prisoners in the Albany penitentiary. Both parties were desirous of carrying out the contract. The State was not a party to it. Its interposition was that of the sovereign, and not that of a contractor, and, hence, no question arose with respect to the State, except its constitutional right to impair the obligation of the contract of other parties.

We may assume that the plaintiffs cannot make exact proof of their damages, but we must assume that they can make such proof as will permit them to be ascertained with reasonable certainty. The State, however, having determined that the price per volume of the reports must be reduced, cannot be thwarted in its purpose, because the contractors, whom it must be presumed to be willing to indemnify against loss, will suffer inconvenience in establishing the amount of it.

The interlocutory judgment, and the order upon which it was entered are and each is reversed, and an order allowing the demurrer granted.

Judgment affirmed with leave to defendant to answer over within twenty days.

EDWARD R. MILLER and EDWARD L. RUSSELL, Respondents, v.
CHARLES A. SMITH and Others, Defendants; SELAH W. HALLEN-
BECK and CHARLES F. ALLEN, Appellants; EDGAR L. DURKEE and
FRED M. YOUNG, Respondents.

*Mechanic's lien — payments made in good faith in advance of their becoming due —
effect of the contractor giving a note to a sub-contractor.*

Under the provisions of the Mechanics' Lien Act (Chap. 342, Laws of 1885, as amended by chap. 673, Laws of 1895) an owner of property, engaged in erecting a building thereon, who, in good faith and without fraud or collusion, pays to the principal contractor a balance due him, in advance of the time of payment fixed by the contract, is entitled to be credited with the amount of such payment in an action brought by creditors of the contractor to enforce liens filed against the property for materials furnished by them to the contractor, and used in its construction.

The fact that a sub-contractor receives from the principal contractor a note for his claim against him, does not extinguish the debt, nor prevent the former, upon the dishonor of the note, prior to the expiration of the time for filing a mechanic's lien upon the premises, from availing himself of that remedy.

APPEAL by the defendants, Selah W. Hallenbeck and another, from a judgment of the Supreme Court in favor of the plaintiffs and certain of the defendants, entered in the office of the clerk of the county of Fulton on the 17th day of May, 1897, upon the decision of the court rendered at the Fulton Special Term.

This action was brought to foreclose a mechanic's lien filed by the plaintiffs upon premises owned by the defendants Hallenbeck & Allen.

The defendants Hallenbeck & Allen, being the owners of a certain lot of land, entered into a contract with the defendants Charles A. Smith and Josiah Smith for the erection of a building thereon for the sum of \$8,690, to be paid as follows: Eighty per cent of the value of the work and materials placed in the building to be paid every thirty days, until the sum of \$6,952 should be paid, and the balance to be paid sixty days after said contract should be fully completed.

The defendants Smith proceeded under the contract to erect the building, which was completed and accepted April 9, 1896.

The plaintiffs performed labor and furnished materials used in the construction of said building as sub-contractors under the Smiths amounting in value to the sum of \$215.53.

The defendants Durkee & Young furnished the contractors Smith materials for the construction of said building, and used therein, of the value of \$20.65.

Payments were made upon the contract by Hallenbeck & Allen to the contractors Smith from time to time, and on February 19, 1896, they paid the sum of \$1,500 thereon, before the same was due and payable, and received a discount thereon of \$75. On March 7, 1896, being before the same was due, they paid the sum of \$500, less a discount thereon of \$25, leaving then due upon the entire contract price only the sum of about \$200.

The defendant Handy also furnished labor and materials, for which he filed a lien prior to that of the plaintiffs and the defendants Durkee & Young, which lien being paid exhausted the balance of the \$200 remaining unpaid upon the contract.

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The plaintiffs' work being completed, the defendants Smith, on the 18th of January, 1896, gave them a note for the amount thereof, payable three months after date, and took in return a receipt in settlement of their claim. This note went to protest, the defendants Smith becoming insolvent; and the plaintiffs thereafter, and on the 3d day of April, 1896, filed their lien. On the same day the defendants Durkee & Young also filed a lien for the amount of their claim.

The trial court found that the last two payments made by the defendants Hallenbeck & Allen to the contractors Smith, to wit, the sum of \$1,500 paid February 19, 1896, and \$500 paid March 7, 1896, "were made without regard to the rights of the plaintiffs or said Durkee & Co., and in fraud of their rights, and were made collusively and in expectation on the part of said owners of thereby defeating the right of said plaintiffs and said Durkee & Co. to a lien on the said building and premises," and directed judgment in favor of Durkee & Young and of the plaintiffs for the amount of their liens, and from the judgment so rendered this appeal is taken.

C. M. Parke, for the appellants.

L. L. Boyce, for the plaintiffs, respondents.

George H. Witherhead, for the respondents, Durkee and Young.

HERRICK, J.:

If the finding of the trial court, that the payments of \$1,500 and \$500 were in fraud of the rights of the plaintiffs, and were made collusively, is correct, it disposes of this appeal.

After a careful examination of the evidence as it appears in the printed record, I am unable to find any evidence to support that finding of fact, except that such payments were made in advance of the time when they were due, and that the defendants Hallenbeck & Allen received a discount thereon of \$75 upon the \$1,500 payment, and \$25 upon the \$500 payment.

On the other hand, it does appear in the case from the testimony of Smith, one of the contractors, that at the time of making these payments, Mr. Hallenbeck asked him if he had settled with Miller & Russell, and was told that he had, "by paying them with a note;"

and from the testimony of Hallenbeck, that he was told at the time of such payment, apparently at the time of the last payment, "That there were no claims that were on or were to be put on or could be put on;" and that he had no knowledge that Durkee & Young had any claim. These inquiries by the defendant Hallenbeck before he made the final payment of \$500, and the answers that he received, would indicate that he was acting in good faith.

It is true that the fact that the plaintiffs had received a note in payment of their claim did not extinguish it, or prevent their filing a lien upon the note becoming due and remaining unpaid, prior to the expiration of the time fixed by the statute for filing liens. (*Jones v. Moores*, 67 Hun, 109.)

But at that time the contractors Smith had not become insolvent, the note had not become due, and the defendant Hallenbeck had been told by the defendants Smith that they were worth \$9,000, so that he had reason to suppose that the settlement with the plaintiffs by the Smiths' note was a final settlement, and that such note would be paid at maturity.

It does not seem to me that any inference of bad faith or collusion can be drawn from the fact that the defendants Hallenbeck & Allen asked a discount as a condition of making payments in advance of the time that they were due; the reasons that they gave to the contractors Smith, that they had to raise the money, and that it would cost them something, and by that I assume they meant that they would have to pay a discount, are not unreasonable or improbable.

The uncontradicted evidence that I have recited seems to me greatly more than sufficient to overcome any possible inference to be drawn from the mere fact that the money was paid in advance of the time specified in the contract, and that a discount was paid and received upon its being so paid.

The reading of the statute implies that payments may be made in advance of the time specified in the contract, without there being any fraud or collusion.

That payments were made collusively is something that must be affirmatively proved, and while the trial court was at liberty to discredit the testimony of the witnesses Hallenbeck and Smith, yet, the mere fact that the testimony of a witness as to a fact is not

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believed does not of itself warrant a finding to the direct opposite of such testimony. I think, therefore, that the finding of the trial court, that such payments were made fraudulently and collusively, is not warranted by the evidence, and should be reversed, and that leaves the facts simply that the owners of the building have made payments in advance of the terms of the contract, and that thereby there is not sufficient money left in their hands due the contractors to meet the lien of the plaintiffs and of Durkee & Young, and we are asked to hold that payment in advance of the terms of the contract, and which leaves an amount insufficient to pay the claims of the lienors, is contrary to the terms of the statute, and will not relieve the owners of the property so paying from the lien of the mechanic, and we are referred to the case of *The H. B. C. Co. v. N. Y. C. & H. R. R. Co.* (145 N. Y. 390) to sustain that proposition.

In that case, at pages 394 and 395, the court said: "Under the Lien Act of 1885, chapter 342, it has been held in this court that where the owner has made payments to his contractor, although without fraud or collusion, before they are due under the terms of the contract, such payments cannot be allowed to the owner. (*Post v. Campbell*, 83 N. Y. 279, 283.)"

Of course, if that is a correct statement of the law, it disposes of the case before us. While I feel obligated to respect and follow the decisions of the Court of Appeals, yet when a statement appears in an opinion of that court, which is evidently inadvertently made, it does not seem to me to be controlling. The case referred to in the opinion, that of *Post v. Campbell*, was not a case arising under chapter 342 of the Laws of 1885, but under chapter 478 of the Laws of 1862; that law provides for disallowing as against lienors any payments made "by collusion for the purpose of avoiding the provisions of this act, or in advance of the terms of any contract," whereas chapter 342 of the Laws of 1885, as amended by chapter 673 of the Laws of 1895, provides for disallowing, as against lienors, any payments made "for the purpose of avoiding the provisions of this act, or in advance of the terms of any contract * * * by collusion," etc.

The distinction is obvious and need not be dwelt upon.

So the case of *Cheney v. Troy Hospital Assn.* (65 N. Y. 282), cited

in *Banham v. Roberts* (78 Hun, 246) to sustain the same proposition, was likewise decided under an act which provided that where the owner, "by collusion, for the purpose of avoiding the provisions of this act, or in advance of the terms of any contract," made payments, such payments should not be available to defeat a lienor.

I think that neither the cases of *The H. B. C. Co. v. N. Y. C. & H. R. R. Co.*, or of *Cheney v. Troy Hospital*, or of *Post v. Campbell*, can be regarded as authorities upon the construction of chapter 342 of the Laws of 1885, as amended by chapter 673 of the Laws of 1895.

It seems to me that a plain reading of the statute requires us to hold that, except in cases of fraud or collusion, the owner cannot be compelled to pay any greater sum than the amount specified in his contract. (*French v. Bauer*, 134 N. Y. 548. See, also, *Bradley & Currier Co. v. Ward*, 15 App. Div. 386.)

To sustain the judgment in this case would be to compel the owners to pay more than the amount specified in their contract, without any fraud or collusion on their part being shown.

The judgment should, therefore, be reversed, and a new trial granted, costs to abide the event.

All concurred.

Judgment reversed, a new trial granted, costs to abide the event.

JED H. GRIFFIN, Appellant, v. WILLIAM BARTON, Respondent.

Jurisdiction—failure to insert the date in a verification—presumption that a petition in a summary proceeding was verified before the precept was issued.

Where the petition and precept, in a landlord and tenant proceeding, are each dated the same day, and the day of the month is not filled in in the *jurat* attached to the petition, which is, however, verified before the justice of the peace who issues the precept, and his return upon appeal recites "a petition, duly verified, having been presented to the undersigned justice of the peace, on behalf of and by" the landlord, the appellate court will assume that the date of the verification of the petition was the day upon which it was used and upon which the precept was issued thereon, and the justice will not be required to make a further return specifying whether or not the petition was verified prior to the issuing of the precept.

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APPEAL by the plaintiff, Jed H. Griffin, from an order of the Franklin County Court, made at a term of the County Court of Franklin county, and entered in the office of the clerk of the county of Franklin on the 6th day of July, 1897, denying the plaintiff's motion for an order that the justice before whom the case was tried make and file an amended return herein, in which he specify whether or not the petition was verified prior to the issuing of the precept.

Gordon H. Main, for the appellant.

John P. Kellas, for the respondent.

HERRICK, J.:

The return of the justice already made sets forth that "a petition, duly verified, having been presented to the undersigned justice of the peace, on behalf of and by Jed H. Griffin, landlord," etc.

That is a statement that the petition was properly verified when it was presented to and used before him as a basis for the issuing of a precept.

The petition itself is printed in the record before us, and from it it appears that it was sworn to before the justice who issued the precept in the action and who made the return to the County Court. His name is attached to it as the officer before whom the petitioner was sworn; the proper *jurat* is attached, except that the day of the month when it was verified is left blank; this does not, under the circumstances, render the verification defective; it is a mere formal error of a kind which will, as a rule, be disregarded. (*Babcock v. Kuntzsch*, 85 Hun, 33.)

The petition is dated March 27, 1897, and the precept issued in pursuance of it is also dated March 27, 1897, and the verification having been made before the justice who issued the process, and he having certified in his return that before he issued the process a duly verified petition was presented to him, the court may fairly assume upon appeal that the date of its verification was the day upon which it was used and caused the issuing of the process, to wit, the 27th day of March, 1897, and, therefore, a further return is unnecessary, and the order appealed from should be affirmed.

All concurred.

Order affirmed, with ten dollars costs and disbursements.

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THE PEOPLE OF THE STATE OF NEW YORK ex rel. STANDARD WOOD COMPANY, Relator, v. JAMES A. ROBERTS, as Comptroller of the State of New York, Respondent.

Taxation — a foreign corporation producing kiln dried kindling wood, done up in bundles, is engaged in carrying on a manufacture and is not taxable upon its franchise or business — office and office furniture within the State.

A foreign corporation, having an office and ordinary office furniture within the State of New York, but all of whose capital within the State is employed in making and selling, within the State alone, kindling wood produced from slate taken in their natural state, sawed into strips and securely compressed in bundles of kiln dried wood of a specific size and shape and designed to be used in that shape for the purpose of kindling anthracite coal, is a corporation wholly engaged in carrying on manufacture in the State of New York, within the meaning of chapter 542 of the Laws of 1880, and the acts amendatory thereof, and, consequently, is not subject to a tax upon its franchise or business.

CERTIORARI issued out of the Supreme Court and attested on the 8th day of June, 1897, directed to James A. Roberts, as Comptroller of the State of New York, commanding him to certify and return to the office of the clerk of the county of Albany all and singular his proceedings in regard to the taxation of the relator.

The relator is a foreign corporation organized under the laws of New Jersey, and carries on business in the States of Maine, New Hampshire, New York and Pennsylvania.

The business of the relator is that of making and selling kindling wood, principally to be used as a kindler of anthracite coal.

The capital that it has invested in the State of New York is used in the making of kindling wood; it has an office for which it pays a rental of \$1,000 a year, and office furniture of about the value of \$400.

All of its products made within this State are sold within this State, and none of its products made without the State of New York are sold within the State of New York.

It has three plants for the making of kindling wood in this State. The manner in which this kindling wood is made is as follows: The relator purchases at sawmills the green slabs of wood cut from logs, these slabs of wood are split, or rather sawed, into strips about one and a half inches square by a number of saws operating upon a

sawtable run by steam machinery; these strips are in turn cut into pieces a little under three inches in length by a number of saws operating upon a sawtable run by steam machinery; the blocks or strips thus cut, as they fall from the table, are caught in an elevator run by an endless chain which carries them to the top of a building used as a kiln, where they are kilndried, the kiln being heated by a system of steam pipes which thoroughly dries the blocks so that they will readily ignite; the blocks so dried are gathered together into a bundle of about one foot in diameter and of the length or thickness of one block or strip, and are then placed into a press operated by steam power which compresses the bundle to its smallest circumference; while in the press a cord is tied around the bundle and it is then ready for the market.

It is apparently used as a kindler, not by separating the bundle into its parts, but by using the block or bundle as a whole as a piece of kindling wood.

The Comptroller held that the business of the relator was not a manufacturing business within the meaning of the statute (Chap. 542 of 1880, and the acts amendatory thereof) and assessed it accordingly.

Henry S. Wardner and John L. Cadwalader, for the appellant.

Theodore E. Hancock, Attorney-General, and G. D. B. Hasbrouck, Deputy Attorney-General, for the respondent.

HERRICK, J. :

The article produced by the relator is a commercial article known and recognized by a specific and distinctive name, a product the result of capital and labor, and different in form and condition from the material out of which it is made; it is obvious that neither the tree from which the wood comes nor the slabs of wood could be used in their original form as kindling wood, and that the relator has, by the use of machinery, skill, capital and labor, produced a new article, different in form, quickly inflammable, with a distinctive name, and fitted for sale, use and consumption, which, within the definitions, constitutes a manufactured article, and the business of producing it that of manufacturing.

It is needless to quote the definitions given by lexicographers, or in the opinions of courts, as to what constitutes manufacturing, but to

simply refer to the Century Dictionary, Standard Dictionary, Worcester's Dictionary, *People ex rel. Union Pacific Tea Co. v. Roberts* (145 N. Y. 375); *People ex rel. Brush El. Mfg. Co. v. Wemple* (129 id. 543, 552); *Evening Journal Association v. State Board of Assessors* (47 N. J. Law, 38); *Carlin v. Western Assurance Co. of Toronto* (57 Md. 515, 526); *United States v. Hathaway* (4 Wall. 404), as authorities within whose terms and principles the business carried on by the relator is clearly that of manufacturing.

The having of an office and office furniture are merely incidents to the business carried on by them of manufacturing, and the value of the one and the rental of the other do not constitute capital stock separate and apart from that used and employed in their business of manufacturing, and the amount so used is, therefore, not taxable.

The capital of the relator that it has in this State being wholly engaged in manufacturing business, the determination of the Comptroller should be reversed, with fifty dollars costs and disbursements.

All concurred.

Determination of Comptroller reversed, with fifty dollars costs and disbursements.

EDWIN PERHAM, Respondent, v. RESIDORE NOEL, Appellant.

Witness — cross-examination as to whether he has been convicted of a crime and as to his having been in jail.

It is proper on the cross-examination of a witness to ask whether he has been convicted of a crime or misdemeanor.

Semble, that the question as to how many times the witness has been in jail, rests in the discretion of the court.

APPEAL by the defendant, Residore Noel, from a judgment of the County Court of Clinton county, entered in the office of the clerk of the county of Clinton on the 8th day of February, 1897, affirming a judgment of a justice of the peace.

H. S. Haff, for the appellant.

John H. Booth, for the respondent.

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MERWIN, J. :

The plaintiff claimed to recover for work, labor and services. He was an important witness in his own behalf. Upon his cross-examination by the counsel for the defendant he was asked the following questions :

“ How many times have you been in jail ? How many times have you been in State prison ? ” Each of these questions was objected to as immaterial, and in each instance the objection was sustained. The defendant then offered to prove by the witness that he had been convicted of felony and been sentenced to State prison. The plaintiff objected to this as immaterial, and upon the further ground that “ a record of conviction can only be produced to impeach the witness’ testimony. ” The objection was sustained and the evidence excluded.

It was competent for the defendant, on cross-examination, to prove by the witness that he had been convicted of a crime or misdemeanor. (Code Civ. Proc. § 832 ; *People v. Burns*, 33 Hun, 296 ; *People v. Noelke*, 94 N. Y. 137.) In *People v. Hovey* (29 Hun, 382) it was held competent under section 832 to ask a witness how many times he had been in prison. The allowance of the question as to the witness being in jail was somewhat in the discretion of the court (*Real v. The People*, 42 N. Y. 270), though it is said that the discretion should be liberally exercised with a view to arrive at the truth. The exclusion of the offered proof as to conviction was error, and prejudicial to the rights of the defendant.

It is suggested that the offer was improper, but no objection was taken to the form of it, or that a direct question should be asked.

The evidence of the witness was quite material, and, as to some of the disputed facts, he was the only witness on the part of the plaintiff. The error referred to cannot be properly disregarded. It follows that there must be a reversal.

All concurred.

Judgment of the County Court and of the Justice’s, reversed, with costs in all the courts.

THE FIRST NATIONAL BANK OF CANTON, N. Y., Respondent, v. MONROE B. WASHBURN, Individually and as Receiver, etc., of SMITH & HANFIELD, Appellant, Impleaded with CHARLES F. WHITCHER and Others.

Costs—a receiver may be charged with the costs incurred by his unnecessary defense—although in default, he is entitled to notice of an application to charge him, personally, with costs.

Where a receiver made a party to an action brought to foreclose a mortgage, although served with a notice that no personal claim is made against him, interposes an answer denying any knowledge or information sufficient to form a belief as to the matters contained in the complaint, he becomes, upon his default at the trial of the action, liable for costs, but only to the extent of the costs incurred by the interposition of his answer; and before the plaintiff can charge the receiver, personally, with the payment of the costs, he is entitled to due notice of the application for such relief.

APPEAL by the defendant, Monroe B. Washburn, individually and as receiver of the property of the firm of Smith & Hanfield, from an order of the Supreme Court, made at the Warren Special Term and entered in the office of the clerk of the county of St. Lawrence on the 14th day of June, 1897, denying his motion to resettle the findings and open the judgment entered in the action.

Abram J. Rose and Philip M. Brett, for the appellant.

Lawrence Russell and J. S. D'Amoreaux, for the respondent.

MERWIN, J.:

This action was commenced in December, 1895, for the foreclosure of two mortgages bearing date August 1, 1894, for the sum, in the aggregate, of \$10,000 and interest. The full amount of the mortgages was claimed to be due. James S. Smith, as receiver of the property of the firm of Smith & Hanfield, was made a party defendant, it being alleged that he, among others, had, or claimed, some interest in or lien on the premises subsequent to the lien of the mortgages. Smith, as receiver, was not served, and on the 3d of June, 1896, Monroe B. Washburn was substituted as receiver in the place of Smith. On the application of the plaintiff, Washburn, as

receiver, was afterwards made a party defendant, and on the 13th of November, 1896, he was served with the summons, complaint and notice of no personal claim. On December 3, 1896, he served an answer denying any knowledge or information sufficient to form a belief as to the matters contained in the complaint. On the 17th of April, 1897, the plaintiff's attorney served on the attorneys for the receiver a notice of trial for the St. Lawrence term to be held on the 3d of May, 1897, stating also that a motion would then and there be made for judgment, with costs. At the term on the third of May, the receiver did not appear, and as to him judgment was taken by default. Findings were made by the court, in which, among others, there was a finding of fact that the receiver "having been duly served herein with due notice of no personal claim against him, unreasonably defends this action." The fourth finding of law was "that the plaintiff herein have judgment against the defendant, Monroe B. Washburn, personally, and as such receiver, for the costs of this action. In case, however, the premises sell for more than sufficient to pay the amounts due on the bonds and mortgages and the expenses of sale only, the amount of deficiency to pay the costs in full shall be collected of the said Washburn." On the 4th of May, 1897, judgment was entered in accordance with these findings. On the same day the costs of the plaintiff were taxed at the sum of \$409.62, and notice of readjustment for the eighteenth of May served upon the attorneys for the receiver. Thereupon, on the twelfth of May the attorneys for the receiver served papers for a motion at Special Term to strike out from the findings and judgment the provisions charging the said Washburn personally, and as receiver, with costs, or that his default at the trial be opened and the judgment set aside, and that he be permitted to show that he has not unreasonably defended the action and is not liable for the costs. This motion was denied, and Washburn, individually, and as receiver, appeals.

The Special Term at which the motion was made was held by the same judge who tried the case.

No notice was given to Washburn or his attorney that an application would be made to charge him personally with the costs. He was entitled to such a notice within the rule laid down in *Slocum v. Barry* (38 N. Y. 46). The notice, in fact given, did not apprise

him of any such intention. The findings and judgment were, we think, irregular so far as they assumed to pass upon the question of his personal liability. Upon his motion at the Special Term he was entitled to have the provisions on that subject stricken out, without prejudice, however, to any proper application by the plaintiff on the subject.

The appellant also claims relief from the judgment against him as receiver for the entire costs of the action in case the premises do not bring enough to pay the entire debt and costs. This matter was, under the notice, properly before the court for consideration, and the receiver was bound to expect that he might, as such, be charged with costs. He put in a defense when he had none, and some delay was thereby occasioned. Had the costs charged against the estate in his hands been limited to the costs incurred by reason of the answer being put in, he would have had no good reason to complain. It has been held in similar cases that the costs, chargeable upon a party who unreasonably defends, were those occasioned by such defense. (*Bank of Plattsburgh v. Platt*, 1 Paige, 464; *Park v. Peck*, Id. 477.) In the present case, instead of being charged with the additional costs made necessary by the answer, which, as appears by the bill of costs in the printed papers, are about the sum of \$45, he is charged with the entire bill, which is \$409.62. What the interest of the receiver, or of the firm he represents, is in the mortgaged premises, is not made to appear; no affidavit is made by the receiver, but one is made by the attorney who seems to be familiar with the facts. The Special Term, in effect, held that no sufficient excuse was presented for opening the default. This would, we think, be correct, provided the costs charged by the judgment against the receiver had been limited to those usually chargeable in such cases. No sufficient reason is apparent in the papers before us to punish the receiver to the extent of the large amount of costs that would have been incurred just the same had he not answered.

If the plaintiff stipulates to limit the amount of costs chargeable to the appellant as receiver to the sum of forty-five dollars, then the motion to open the default on that subject should be denied. Otherwise the default of the receiver as such, should be opened so far as his liability for costs is concerned, and he be permitted to have a hearing upon that question as upon a question reserved. This, how-

ever, should be on condition that the decision and judgment in other respects stand in full force.

It follows that the order appealed from should be reversed, and relief granted as follows :

1. So much of the decision and judgment as directs the payment of the costs by the defendant Washburn, personally, should be stricken out as irregular, without prejudice to any proper application for such relief.

2. If the plaintiff within twenty days stipulates to limit the liability of Washburn as receiver for costs to the amount of forty-five dollars, the motion to open the default of the receiver in that regard should be denied, otherwise granted, and he be permitted to have a hearing upon that question as upon a question reserved, upon condition, however, that the decision and judgment, except as to the disputed costs, stand in full force.

All concurred.

Order reversed, with ten dollars costs and disbursements, and relief granted as stated in the opinion.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. NEW ENGLAND
DRESSED MEAT AND WOOL COMPANY, Relator, v. JAMES A.
ROBERTS, as Comptroller of the State of New York, Respondent.

Taxation— a foreign corporation slaughtering sheep and selling the flesh and converting the residue into marketable products is a manufacturing corporation.

A foreign corporation, whose entire capital employed within the State of New York is used in buying sheep, converting them into mutton, refrigerating the mutton by such processes as improve its quality and preserve it, transporting and selling it, and also in converting other parts of the sheep into marketable products, is engaged in manufacture within the State of New York, and is, therefore, not subject to a tax upon its capital stock under chapter 542 of the Laws of 1880, and the various acts amendatory thereof.

CERTIORARI issued out of the Supreme Court and attested on the 25th day of May, 1897, directed to James A. Roberts, as Comptroller of the State of New York, commanding him to certify and return to the office of the clerk of the county of Albany all and

singular his proceedings in relation to imposing a tax, under chapter 542 of the Laws of 1880, and the acts amendatory thereof, upon the capital stock of the relator, a corporation organized under the laws of the State of Maine, and engaged in business in the State of New York.

James W. Eaton, for the relator.

T. E. Hancock, Attorney-General, and *G. D. B. Hasbrouck*, Deputy Attorney-General, for the respondent.

LANDON, J.:

We think the return of the Comptroller and the evidence accompanying it show that the relator was exempt from the tax imposed, for the reason that all of its capital actually employed in this State during the period for which the tax was imposed, namely, for the three years ending October 31, 1896, was employed in manufacturing within this State, and in the sale therein, of the product of such manufacturing.

The business of the relator in this State consisted of buying within the State sheep and lambs, slaughtering them and converting the carcasses into mutton, and refrigerating the same by such processes as improve the quality thereof and preserve the same for a considerable length of time from natural decay, employing for the purpose a carefully devised refrigerating plant and such appliances as insured with great certainty the results desired, and then the transportation of such mutton in refrigerator cars, and its sale; also, the converting the other parts of the sheep into tallow, ammonia, fertilizer and other marketable products.

The Comptroller, as we understand the return, held that the production of the mutton, as above stated, was not a manufacture, and hence he imposed the tax. Within the principle of *The People ex rel. Standard Wood Co. v. Roberts* (*ante*, p. 514), herewith decided, we reverse, with fifty dollars costs and disbursements, the determination of the Comptroller imposing the tax.

All concurred.

Determination of the Comptroller reversed, with fifty dollars costs and disbursements.

J. SAMUEL LEMON, as Administrator, etc., of HOPE A. LEMON, Deceased, Appellant, v. ADON SMITH, Individually and as Executor, etc.; HARLAN P. SMITH, ARTHUR J. SMITH and ADON N. SMITH, as Executors, etc., of JONAH D. F. SMITH, Deceased, Respondents; INA S. COWELL and Others, Infants, Appellants; and GEORGE A. HAVEN, as Executor, etc., of SAMUEL R. SMITH, Deceased.

ESTHER J. SMITH, as Administratrix, etc., of RICHARD O. SMITH, Deceased, Appellant, v. ADON SMITH, Individually and as Executor, etc.; HARLAN P. SMITH, ARTHUR J. SMITH and ADON N. SMITH, as Executors, etc., of JONAH D. F. SMITH, Deceased, Respondents; INA S. COWELL and Others, Infants, Appellants; and GEORGE A. HAVEN, as Executor, etc., of SAMUEL R. SMITH, Deceased.

Reference—death of one of several defendants before the coming in of the report.

Where a defendant, without whose presence, although he is a proper party to the action, the issues between the plaintiffs and the other defendants could be determined and a proper judgment be rendered, die before the referee, to whom the controversy has been referred, has delivered his report, the case comes within section 759 of the Code of Civil Procedure, and the reference may proceed without bringing in as a party the successor to the rights and liabilities of the deceased party.

The death of such a defendant is not a good ground of preliminary objection to a motion, made on the grounds of surprise, irregularities and fraud, to set aside the report of the referee delivered subsequent to such death.

The report subsequently delivered is valid as between the plaintiffs and the surviving defendants, but is, under section 765 of the Code of Civil Procedure, absolutely void as against the deceased party and those whose interests would be affected by the determination of his rights and liabilities.

APPEAL by the plaintiff in each of the above-entitled actions, and also by the guardian *ad litem* of the infant defendants in each of the above-entitled actions, from an order of the Supreme Court, made at the Onondaga Special Term and entered in the office of the clerk of the county of Madison on the 13th day of May, 1897, as amended by an order made at the Oneida Special Term and entered in the office of the clerk of the county of Madison on the

29th day of May, 1897, denying their motion to vacate, annul and set aside the referee's report and the order of reference in each of said actions on the grounds:

Of surprise.

On the ground of irregularity.

On the ground of fraud, irregularity and surprise, in this, to wit: That certain exhibits, being Exhibits 1 and 3 of November 15, 1893, offered by plaintiffs were furnished the referee by the defendants in a condition materially different from what they were when received in evidence, in this, to wit: That the same were furnished to the referee by defendants as and for the real exhibits and considered by him in deciding a material question of fact involved in both of said actions.

On the ground of other surprises and irregularities.

That the orders of reference in both of these actions made on or about November 11, 1891, and entered in Madison county clerk's office about November 11, 1891, be vacated, annulled and set aside.

Albert C. Tennant, for the plaintiffs, appellants.

William Man, for the defendant, respondent, Adon Smith.

John E. Parsons, for the defendant, respondent, Harlan P. Smith.

S. M. Lindsley, for the defendants, respondents, Arthur J. Smith and Adon N. Smith as executors, etc., of Jonah D. F. Smith, deceased.

LONDON, J.:

The motion of the plaintiffs to vacate, annul and set aside the referee's report and decision, and also the order of reference, was denied by the Special Term, not upon the merits, but because of the preliminary objections made by the respondents. The principal objection and the only one we need consider, was, that inasmuch as one of the defendants, Samuel R. Smith, died before the referee delivered his report, his executor not having been substituted as a party in his place, the report and all proceedings in the action sub-

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sequent to his death, and before the substitution of the executor in his place, were void; and that the executor of the deceased defendant having been substituted in his place, the trial of the action should proceed before the referee as if no report had been made. As the plaintiffs have not had their motion heard upon the merits, we proceed to examine the preliminary objection which has thus far defeated such hearing.

In section 759 of the Code of Civil Procedure it is provided that "In case of the death of one of two or more plaintiffs or one of two or more defendants, if part only of the cause of action, or part of some two or more distinct causes of action, survives to or against the others, the action may proceed, without bringing in the successor to the rights or liabilities of the deceased party, and the judgment shall not affect him or his interest in the subject of the action."

Section 765 provides that "This title does not authorize the entry of a judgment against a party who dies before a verdict, report or decision is actually rendered against him. In that case, the verdict, report or decision is absolutely void."

These actions were brought by the plaintiffs against three of the original defendants to set aside the transfers which the plaintiffs made to said defendants of their interest in the estate of the late Sidney Smith, the plaintiffs alleging that they were induced to make such transfers to said defendants by the fraudulent misrepresentations and concealments of the latter, and they asked that the defendants account and pay over to them the true amount of such interest. Samuel R. Smith was, upon his motion, subsequently brought in as a party defendant, and in his answer he claimed like relief for like cause against the three defendants. He was a proper party to the action; it was convenient to try his cause of action against the three defendants at the same time that the plaintiffs tried theirs, but it is plain that he was not a necessary party because he made the transfer of his interest to the three defendants in pursuance of his separate contract with them, and if he was defrauded, it was not a parcel of the same fraud of which the plaintiffs complain. The issues between the plaintiffs and the three defendants could be determined, and a proper judgment rendered, without the presence of Samuel R. Smith as a party. His alleged cause of action was like that of the plaintiffs, but not the same nor in community with

theirs; theirs might have been good, and his bad; therefore, when he died, his cause of action, which he separately asserted in his answer against the three defendants, was separately suspended; but the cause of action asserted by the plaintiffs against the same defendants, and their right and capacity to prosecute it, were in no way affected, suspended or abated by his death. And hence, under section 759, the action in favor of the plaintiffs against the three defendants might proceed without bringing in the successor to the rights or liabilities of the deceased party, and the referee's report thereupon was valid as between the plaintiffs and the three defendants, although it could in no wise affect the deceased party or his interests in the subject of the action.

Section 765 declares that this title does not authorize the entry of the judgment against a party who dies before a verdict, report or decision is actually rendered against him. In that case, the verdict, report or decision is absolutely void. Void as to whom? Clearly, as to the party who is dead, and as to the parties whose interests would be affected by the determination of the dead man's rights or obligations. The dead man has ceased to exist, and any determination respecting him, his duties or obligations, is as much of a non-entity as he is, and, therefore, is void; but the report, determination or judgment between the living persons, if susceptible of being made entirely apart from any rights, obligations, acts or interests of the deceased, and actually so made, should no more be affected by his decease than by any immaterial event. To such effect, we think, are the authorities. (*Leggett v. Dubois*, 2 Paige, 213; *Lachaise v. Libby*, 13 Abb. Pr. 6; *Halstead v. Cockcroft*, 49 How. Pr. 342; *Hancock v. Hancock*, 22 N. Y. 568; *De Agreda v. Mantel*, 1 Abb. Pr. 137; *Lyon v. Park*, 111 N. Y. 356; *Webster v. Kings Co. Trust Co.*, 145 id. 275.)

The report of the referee, as made after the death of Samuel R. Smith, was regular and valid as against the plaintiffs, and as between them and the living defendants, but was void as to the separate cause of action of Samuel R. Smith against the three defendants.

The learned judge at Special Term, therefore, erred in denying the plaintiff's motion because of the preliminary objection. The order must be reversed, with ten dollars costs and disbursements, and the motion remitted to the Special Term with instructions to

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hear and determine the same upon the merits. (*Anderson v. Sherwood*, 9 N. Y. St. Repr. 636.)

All concurred.

Order reversed, with ten dollars costs and disbursements, and motion remitted to the Special Term with instructions to hear and determine the same upon the merits.

JESSIE D. PLUMMER, Appellant, v. THE GLOVERSVILLE ELECTRIC COMPANY, Respondent.

Complaint—allegations in ejectment joined with a statement that the defendant stretched wires over the land and a prayer that they be removed.

The complaint in an action brought against an electric company alleged that the defendant unlawfully entered upon the premises described in the complaint, they then being the property of and in the possession of the plaintiff, and that the defendant was still in possession thereof and unlawfully withheld the premises from the plaintiff, and, further, that when such entry was made the servants and agents so making it stretched wires across and over the entire premises and that such possession was so taken and was still held for the purpose of transmitting electricity across the premises upon such wires, and asked judgment that the defendant remove such wires from the premises.

Held, that the latter allegations characterized the alleged possession of the defendant, and, though averred in connection with the statement that the possession of the premises was unlawfully detained, were not to be treated as surplusage:

That, if sustained by proof, especially in the absence of objection that they were not within the issues made by the pleadings, they established the plaintiff's right to a part of the relief asked for—the removal of the wires.

APPEAL by the plaintiff, Jessie D. Plummer, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Fulton on the 18th day of January, 1897, upon the dismissal of the complaint directed by the court after a trial before the court without a jury.

Clark L. Jordan, for the appellant.

Edgar A. Spencer, for the respondent.

PARKER, P. J. :

The complaint in this action was dismissed upon the trial, on the ground that it states a cause of action for ejectment only, and that, upon the facts proven, an action of ejectment could not be maintained against the defendant.

Without discussing the question whether or not such an action would lie, we are of the opinion that the trial court imposed too strict a construction upon the complaint. It is true that such complaint states all the facts which would be necessary to establish a cause of action in ejectment against the defendant. It avers that the defendant unlawfully entered upon the premises described in the complaint, they then being the property of and in the possession of the plaintiff, and that it is still in possession thereof and unlawfully withholds them from the plaintiff. But, in connection with these averments, it alleges several other facts that are not at all applicable to an action in ejectment. Thus it states that when such entry was made, the servants and agents so making it stretched wires across and over the entire premises; and that such possession was so taken and is still held for the purpose of transmitting electricity across the premises upon such wires, and for the purpose of maintaining electric lights for its own use, in violation of the plaintiff's rights and without paying, or offering to pay, any compensation therefor, and without any right or title so to do. These additional statements characterize the possession which the plaintiff claims the defendant has, and the prayer for judgment, that the defendant remove such wires from said premises, indicates what the possession was that the plaintiff wished surrendered to her. These additional facts show that the defendant has, without lawful authority, and in violation of the plaintiff's rights, entered upon her premises, stretched its wires across the same, and is still — in contempt of her objection — using and maintaining them there. Here is a cause of action set up which the facts proven sustained. We do not think that they should have been treated as surplusage merely, although averred in connection with the further statement that the possession of the premises described was unlawfully detained from her. We think the facts proven were admissible under the complaint, as it should fairly be construed, and that being proven to the court they established her right to a portion, at least, of the relief which she asked, to wit, the

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judgment of the court that defendant remove the wires which it was maintaining there. Such a judgment could easily be enforced under the provisions of section 1241 of the Code.

Moreover, all these facts were proven without any objection on defendant's part that they were not within the issues tendered by the complaint, and, being so before the court, it should have rendered judgment for the relief which such facts warranted.

For these reasons the judgment must be reversed and a new trial granted, costs to abide the event.

All concurred.

Judgment reversed, new trial granted, costs to abide the event.

SARAH FABURN, Respondent, v. ORVILLE P. DIMON, as Administrator, etc., of ELIJAH RUGER, Deceased, Appellant.

Statutory reference of a claim rejected by an administrator — how the defense of the Statute of Limitations must be presented.

While it may not be necessary that an administrator state in the rejection of a claim by him or in a stipulation to refer the same that the claim is barred by the Statute of Limitations, yet where no such defense is made or suggested upon the trial and no request is made to the referee to pass upon the question and no exceptions are filed to the referee's report, such defense cannot be presented in the first instance on an appeal.

APPEAL by the defendant, Orville P. Dimon, as administrator, etc., of Elijah Ruger, deceased, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Chemung on the 9th day of July, 1897, upon the report of a referee.

This was a statutory reference of a claim for services alleged to have been rendered by the plaintiff to the defendant's intestate while in the latter's employ.

Francis E. Baldwin, for the appellant.

Sherman Moreland, for the respondent.

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PER CURIAM:

A careful examination of the evidence shows that there is such a conflict over the questions of fact in this case that we are not disposed to interfere with the conclusion to which the referee has arrived concerning them. Nor do we find any error in the referee's rulings sufficient to warrant a reversal of the judgment.

As to the claim that a portion of the demand is barred by the Statute of Limitations, it is sufficient to say that no such claim was made upon the trial, or at any time prior to this appeal. The record does not disclose that such a defense was interposed or ever in any way suggested. No exceptions are filed to the findings of the referee. No requests made to him to pass upon that question. No exceptions taken to the admission of evidence on that ground.

While we do not hold that it is necessary to state such defense in the rejection of the claim, or in the stipulation to refer, yet we think that it should in some form be taken either before or upon the trial, and that it cannot be raised for the first time after judgment and upon appeal.

We conclude, therefore, that the judgment should be affirmed, with costs.

All concurred.

Judgment affirmed, with costs.

LUTHER R. TRYON and FRED L. TRYON, Respondents, v. WILLIAM H. PLUMB, Appellant.*

Executory contract of sale — recovery of the money paid on the delivery of the goods on the ground that they were not as they were represented to be.

Where, under an agreement by a vendor to furnish from his own apples and those he might procure from his neighbors, a certain quantity of apples of a designated quality, to be paid for on delivery, the vendees receive the apples when delivered and make no offer to return them, they are not entitled thereafter to recover the payment made under the contract on the ground that the apples were not as represented by the vendor.

APPEAL by the defendant, William H. Plumb, from a judgment of the County Court of Franklin county, entered in the office of

* The decision in this case was handed down October 1, 1897.

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the clerk of the county of Franklin on the 23d day of November, 1896, upon the verdict of a jury, and also from an order denying the defendant's motion for a new trial made upon the minutes.

This action was brought to recover the sum of \$135, paid by the plaintiffs upon the purchase price of a carload of apples, which, they alleged, were, when delivered, of an inferior quality and not as represented by the defendant.

John P. Kellas, for the appellant.

J. W. Webb, for the respondents.

PUTNAM, J.:

After a careful review of the evidence contained in the case, we are of the opinion that the agreement under which the plaintiffs sought to maintain the action was an executory contract of sale. The apples which the defendant agreed to deliver were not separated from other apples owned by him; some of them were to be procured from other parties. At the time of making the contract, no designated apples were transferred to the plaintiffs, the defendant merely agreeing to furnish to them from his own apples and those that he might procure, a certain quantity of apples of a designated quality.

The plaintiff Luther R. Tryon testified: "I think these apples were to be delivered at North Bangor depot. My son was to superintend the barrelling. We were to examine the apples as they were put in the barrel. The defendant said he thought he could buy some from his neighbors and fill out the contract. These apples were to be paid for when they were delivered." The plaintiff Fred L. Tryon testified: "He (the defendant) picked out a sample of the apples as they would average, different kinds of apples. I took the sample to Moira. Q. Were the apples sold by the sample? A. Yes, sir. He said the apples would be like those samples. This was before the apples were delivered. He said those samples would be the kind he would pick out for us. He said that he would get the apples sorted so that we could come down and get them the last of the week, or the first of the next week following."

Under the principles settled in *Mason et al. v. Smith et al.* (28 N. Y. St. Repr. 519) and the authorities cited in the opinion of LANDON, J., in the case, the plaintiffs, not having returned or offered to return the apples, were not entitled to recover.

In the case cited the plaintiff had agreed to sell to the defendant a bill of gloves of the quality of samples shown. The defendant received and did not return the goods when delivered. It was held no defense that the said goods did not correspond with the samples; that the defendant, if the goods as delivered were not those he agreed to purchase, should have refused to receive them. (See, also, *The Coplay Iron Co. v. Pope et al.*, 108 N. Y. 232.)

It may be said that in the contract passed upon in *Mason et al. v. Smith et al.* the gloves were to be manufactured or imported after the making of the contract, while in the case under consideration the agreement was to sell apples then, in part at least, in the possession of the defendant. But the apples were not separated from other apples owned by the defendant, and a portion agreed to be delivered were to be procured from other parties. Hence, we think the principle of the cases cited applies, and that the judgment and order should be reversed and a new trial granted, costs to abide the event.

All concurred.

Judgment and order reversed, new trial granted, costs to abide the event.

WILLIAM W. BLACKMER, Respondent, v. FRED. C. GREENE,
Defendant.

JOHN H. ROBINSON, Appellant.*

Confession of judgment — insufficient statement of the cause of the indebtedness — an amendment not allowed as against another creditor.

A judgment by confession, in which the statement of the indebtedness is to the effect that the debt and liability were justly due to the plaintiff, being "for a balance due for goods, wares and merchandise sold and delivered to me, Fred C. Greene, by plaintiff, William W. Blackmer, and remaining unpaid and unsecured," does not comply with the requirements of section 1274 of the Code of Civil Procedure, and will be set aside on the application of another creditor of the common debtor.

As against such other creditor, an amendment of the statement will not be allowed.

* The decision in this case was handed down October 1, 1897.

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APPEAL by John H. Robinson from an order of the Supreme Court, made at the Saratoga Special Term and entered in the office of the clerk of the county of Saratoga on the 13th day of September, 1897, denying his motion to set aside the judgment in favor of the plaintiff entered in said clerk's office on the 20th day of July, 1897.

Edgar T. Brackett, for the appellant.

William J. Miner and *Charles H. Sturges*, for the respondent.

PER CURIAM :

This is an appeal by John H. Robinson, a judgment creditor, subsequent to the judgment of the plaintiff, from an order denying his motion to set aside the judgment obtained by the plaintiff on the confession of the defendant.

The statement on which said judgment was entered recites the facts out of which the debt arose as follows: "This confession of judgment is for a debt and liability justly due to the said plaintiff, arising upon the following facts, viz.: being for a balance due for goods, wares and merchandise sold and delivered to me, Fred. C. Greene, by the plaintiff, William W. Blackmer, and remaining unpaid and unsecured."

This statement, we think, is insufficient to meet the requirements of section 1274 of the Code of Civil Procedure, under doctrines established in *Wood v. Mitchell* (117 N. Y. 439). In that case the statement on which the judgment was obtained was as follows: "The said sum of \$5,000 is a balance due to said plaintiff of various sums of money loaned and advanced by him to me, the said defendant, during a period from July 1, 1886, to date, and includes interest upon such loans and advances to this date." It was held to be too indefinite and deficient to meet the requirements of the Code of Civil Procedure, and that the denial of a motion on the part of a subsequent judgment creditor to set aside the judgment was error. The statement in the case cited sets out the facts out of which the debt arose as fully and definitely as the one under consideration; and, under the doctrine established by the Court of Appeals in *Wood v. Mitchell* (*supra*), it is impossible to hold the statement under consideration sufficient.

The case of *Critten v. Vredenburg* (4 App. Div. 216; 151 N. Y. 536) does not lay down any different doctrine from that stated in *Wood v. Mitchell* (*supra*). In *Critten v. Vredenburg* the statement on which the judgment was entered was as follows: That between the 1st day of March, 1893, and the 1st day of October, 1895, the plaintiffs, as copartners, loaned and advanced to the defendant divers and sundry sums of money, which he agreed to repay with interest, did and performed work, labor and services for the defendant in selling merchandise upon commission and guaranteeing the accounts for the same, and that on the 1st day of October, 1895, there was an adjustment of the accounts between the plaintiffs and defendant concerning the said matters, and that the sum of \$19,879.02 was found due the plaintiffs, which the defendant agreed to pay with interest. The statement was held sufficient because it set forth an account stated, on the authority of *Broisted v. Breslin* (5 N. Y. St. Repr. 67; 105 N. Y. 682), the court assuming that, without the averment of an account stated, the statement, which was similar to that under consideration, would have been insufficient. In that case, in the opinion of the Court of Appeals, the court, referring to the case of *Wood v. Mitchell*, says: "That statement was quite different in its effect from the one in question. Its facts were peculiar, and we were quite warranted in holding that their indefiniteness vitiated the confession of judgment. The statement was vague, while the present one sets forth, similarly to a pleading, an account stated upon a certain day, and claims interest upon the sum then found to be due upon the adjustment of accounts from that day." It will thus be seen that the statement in the case cited was sustained on the ground that it averred an account stated.

As against the appellant, we are of opinion that it would not be proper to allow an amendment of the statement on which the judgment was granted. (See *Bradley v. Glass*, 20 App. Div. 200.)

The order should be reversed, with costs and disbursements, and the motion to set aside the judgment granted, with ten dollars costs.

All concurred.

Order reversed, with ten dollars costs and disbursements, and motion to set aside judgment granted, with ten dollars costs.

Cases
DETERMINED IN THE
SECOND DEPARTMENT
IN THE
APPELLATE DIVISION,
October, 1897.

WILLIAM M. SCOTT, Respondent, v. CHARLES E. TWOMBLEY and Others, Each Individually and as a Member of the Board of Trustees of the Village of Jamaica, and Collectively as the Board of Trustees of the Village of Jamaica, Queens County, and ALFRED H. BEERS, as Treasurer of said Village of Jamaica, Appellants.*

Municipal corporation — “electors,” as used in chapter 525 of 1888, authorizing the acquisition of lands for village park purposes — power of the village to issue negotiable bonds to pay for such lands — a holder of a bond is an equitable assignee of the debt.

Chapter 525 of the Laws of 1888, permitting the trustees of an incorporated village to acquire land for a park, and to cause the sum necessary to procure the title thereto to be raised by taxation, either in a single sum or by installments, when “authorized so to do by a vote of the majority of the electors of the village,” is not affected by the provisions of section 13 of title 2 of the General Village Act (Chap. 291 of the Laws of 1870), providing that no person shall vote at a village election upon a proposition to raise or appropriate a tax or purchase property unless, at the time, he or his wife be the owner of property assessed on the last preceding assessment roll.

The statute of 1888 is an original enactment, and the word “electors,” as used therein, embraces all those citizens of the State who, under the Constitution and statutes, are entitled to vote at elections for public officers.

Semble, that although a village has power, under the act of 1888, to purchase land for park purposes on credit, it has not power to issue negotiable bonds to pay therefor, as the issue of such bonds may, on account of their negotiability, impose greater liabilities upon the village than a simple non-negotiable debt to

* The decision in this case was handed down August 2, 1897.

the vendors of the park lands; but although bonds thus issued may be void, they still represent specific parts of the village debt, and a purchaser thereof is the equitable assignee of such part of that debt.

APPEAL by the defendants, Charles E. Twombly and others, each individually and as a member of the board of trustees of the village of Jamaica, and collectively as the board of trustees of the village of Jamaica, Queens county, and Alfred H. Beers, as treasurer of said village of Jamaica, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Queens on the 24th day of July, 1897, granting the plaintiff's motion for an injunction *pendente lite*.

William S. Cogswell, for the appellants.

F. H. Van Vechten, for the respondent.

PER CURIAM:

This action is brought by the plaintiff, as a taxpayer of the village of Jamaica, to restrain the defendants, who are the trustees and treasurer of that village, from paying any money on account of the principal or interest of certain bonds issued for the acquisition of a public park, and from incurring or paying any money for the care and improvement of such park.

At a special election, held on the 29th of June, 1897, a majority of the electors of said village voted in favor of the adoption of a resolution authorizing the trustees to acquire for a park a certain plot of real estate in the village, and for the purpose of such acquisition to raise the sum of \$50,000, in ten annual installments of \$5,000 each; and, in addition thereto, interest at the rate of four per cent per annum upon certificates of indebtedness or bonds. The trustees, in pursuance of this authority, acquired the specified real estate for the purpose of a park, and executed and delivered to the vendors the \$50,000 in bonds or certificates of indebtedness, which are the subject of this controversy. The validity of the bonds is assailed because electors of the town, not owners, either in their own right, or in that of their wives, of property assessed upon the assessment roll of the village, were allowed to participate in the election. For this reason the Special Term held the election void.

We think the election was properly held. The statute of 1888

(Chap. 525) provided a complete scheme for the acquisition of a park by any incorporated village within the State. The first requisite for obtaining a park was that the board of trustees of the village shall be "authorized so to do by a vote of the majority of the electors of the village voting thereon at any annual or special meeting duly called of such electors." There can be no reasonable question as to who are the electors of a village, or of any political division of the State. The term is of frequent use in the Constitution and statutes. They are the citizens of the State who, under the Constitution and statutes, are entitled to vote at elections for public offices. By section 13 of title 2 of the general act for the incorporation of villages (Chap. 291, Laws of 1870), it was provided that no person should vote at a village election upon a proposition to raise or appropriate a tax or purchase property, unless at the time he or his wife was the owner of property assessed on the last preceding assessment roll. This provision substantially enacted that no one but a taxpayer should vote on a proposition to levy a tax or purchase property; but it did not assume to, nor did it in fact, vary or affect the definition of the term "electors." It merely prescribed that certain electors only should vote on certain questions. Under the General Village Act a village had no power to acquire a park, so no such question could be submitted to the taxpayers. The statute of 1888 is an original enactment, and there is not incorporated in it the provisions of the General Village Act. We are, therefore, not justified in giving any other meaning to the term "electors of the village" than the natural and accurate one.

It is urged that the act of 1888 does not authorize the village to issue its bonds for the payment of a park. This may be conceded, but the trustees are authorized on a vote of a majority of the electors to acquire the land and contract therefor, and to cause the sum necessary to procure the title thereto to be raised by taxation, either in a single sum or by installments. This plainly authorized the purchase, either in whole or in part on credit. (*Ketchum v. City of Buffalo*, 14 N. Y. 356.) It may well be that, though the village was authorized to purchase on credit, it was not authorized to issue negotiable bonds, either directly in payment of land or for the purpose of borrowing money thereon from other persons, to be applied

to the same purpose. The issue of such bonds might, on account of their negotiability, impose greater liabilities on the village than a simple non-negotiable debt to the vendors of the park lands. Had the plaintiff intervened promptly to prevent the defendants from giving an acknowledgment of the debt in the form of negotiable bonds, it may well be that their issue should have been restrained. But the bonds have been issued. Conceding for the argument only that the bonds as such are without authority of law and void, that does not relieve the village from the obligation to pay the principal and interest of the debt it owes for the land. The bonds, though considered void as negotiable instruments, may very well be treated as representing specific parts of the village obligation, and the purchaser of the bonds as the equitable assignee of so much of the village debt. If the trustees or electors assumed to go beyond the terms of the statute, and to issue without authority negotiable instruments for the purchase of the lands, it is simply the excess of power that is void; but the obligation of the village to pay for the land acquired still remains, and the title to the land is vested in the village and the trustees are authorized to maintain the park. Both the statute of 1888 and that of 1870 are now repealed, but the repeal took effect subsequent to the transactions recited, and hence does not affect the questions before us.

The order should be reversed, with ten dollars costs and disbursements, and the injunction dissolved, with ten dollars costs to abide the event.

All concurred, except GOODRICH, P. J., not sitting.

Order reversed, with ten dollars costs and disbursements, and injunction dissolved, with ten dollars costs to abide the event of the action.

FLORA L. RAY, Respondent, v. THE NEW YORK BAY EXTENSION
RAILROAD COMPANY, Appellant.

Contempt of court — where a railroad fails to obey a judgment requiring it either to remove an obstruction or to condemn land — appeal.

In an action brought against a railroad company by the owner of premises (access to and the enjoyment of which it had injured by the construction of its road) the court adjudged that the railroad was guilty of erecting an obstruction to the plaintiff's premises, awarded judgment for \$500 damages and directed the removal of the obstruction unless the defendant should pay \$2,000 within sixty days, or should in this time construct a proper crossing over or under its road, and institute condemnation proceedings to acquire the land in question. The railroad took no appeal from this judgment, paid the \$500, and constructed the crossing, but failed to remove the obstruction or institute condemnation proceedings.

Held, that the railroad was guilty of a contempt of court and could not dispute the validity of the former mandate of the court, upon an appeal from an order imposing a fine entered in subsequent proceedings for contempt taken by the owner of the premises.

APPEAL by the defendant, The New York Bay Extension Railroad Company, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Queens on the 13th day of May, 1897, adjudging the defendant guilty of contempt of court and imposing a fine of \$250.

William J. Kelly, for the appellant.

M. E. Harby, for the respondent.

GOODRICH, P. J.:

The complaint in this action alleged that the plaintiff was lawfully seized and possessed in fee simple absolute of certain premises in Hempstead, on Cedar avenue. The premises were, prior to 1877, owned by one Seeley, who conveyed the same to one Ransom by a deed which contained a covenant that Cedar avenue, being sixty feet in width, should be opened as a street, and that the grantee, his heirs and assigns, should enjoy the privilege of using the same forever. In 1884, after several mesne conveyances, the premises were conveyed to the plaintiff by a deed which contained no covenant in respect to the use of Cedar avenue, but contained the following

clause: "Together with the lands forming the streets and avenues opened or to be opened, lying and being in front of or adjoining said premises."

In 1892 the defendant constructed its railroad across Cedar avenue in such a manner as to incumber the plaintiff's access to and enjoyment of the premises, causing damage, as the plaintiff claimed, of some \$6,000.

The action was tried at Special Term and the court decided that Cedar avenue did not appear to be a public highway, but that the plaintiff owned the fee to the middle line of the avenue; that the defendant's embankment was a serious obstruction and a nuisance, and directed judgment for the sum of \$500 damages sustained up to the time of the trial of the action, and for its removal, and enjoined the defendant from maintaining the embankment in Cedar avenue unless it should pay the plaintiff within sixty days after notice of entry of the judgment the sum of \$2,000, or unless within the time aforesaid it should construct across such embankment a proper farm crossing for the use of the plaintiff, over or under the railroad, and within sixty days institute condemnation proceedings to acquire the land of the plaintiff in said street. The defendant paid the judgment for \$500 damages and erected a suitable farm crossing, but did not institute condemnation proceedings and did not remove the embankment.

The plaintiff commenced the present proceeding to punish the defendant as for a contempt in failing to obey the mandate of the court, and an order was subsequently made by the court inflicting a fine of \$250. No appeal was taken from the judgment of the Special Term, and that judgment is *res judicata*. It finds that the plaintiff was the owner of the fee, that the defendant was guilty of erecting an obstruction and nuisance upon the premises, and directs its removal unless the defendant should institute proceedings in condemnation.

The defendant has disobeyed such order and cannot be heard to dispute its validity.

The order is affirmed, with costs.

All concurred.

Order affirmed, with ten dollars costs and disbursements.

FRANK W. SCUTT, Respondent, v. KATE T. WOOLSEY, Appellant.

Contract—construction of an agreement for the negotiation of a loan—when a refusal to accept the loan is not justified.

The owner of certain land wishing to obtain funds with which to pay certain taxes which were a lien upon the premises, executed an agreement by which she commissioned a broker to obtain a loan of a specific sum of money which was to be secured by a mortgage upon the premises, the agreement providing that out of the commission which the owner agreed to pay such broker "all searches of title and incidental expenses (are) to be paid except the procuring of the tax bills, which expense, if any, I (the owner) will pay."

Held, that the owner was not justified in refusing to accept the loan because a bank, with which the broker had placed the loan, had not obtained searches or estimates showing the exact amount of the taxes, so that the owner might know whether the loan would provide her with funds adequate for their discharge, as under the agreement the duty of obtaining the tax bills was incumbent upon the owner;

That the objection that there was no proper tender of the loan or of a proper bond or mortgage, was unavailing, it appearing that the bank was ready and prepared with the necessary funds, and that the bond and mortgage had been prepared;

That the fact that the condition of the proposed mortgage required the loan to be paid in three years, the term specified in the agreement authorizing the broker to secure the loan, and the condition of the bond required it to be paid in one year, in the absence of objection made at the time, and of the attention of the parties being called to the matter, did not justify the refusal of the owner to accept the loan.

APPEAL by the defendant, Kate T. Woolsey, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Queens on the 9th day of October, 1896, upon the verdict of a jury, and also from an order entered in said clerk's office on the 30th day of October, 1896, denying the defendant's motion for a new trial made upon the minutes.

Charles Benner, for the appellant.

A. T. Payne, for the respondent.

GOODRICH, P. J. :

The defendant was the owner of real estate in Long Island City and employed the plaintiff to effect a loan thereon under the following written agreement :

"F. W. SCUTT, Esq.,

"Long Island City :

"DEAR SIR.— I hereby authorize you to procure a loan on bond and mortgage of \$70,000 or \$80,000, as may be needed, at six per cent interest, payable semi-annually, with the usual interest and tax clauses, on my property known as the Casino farm, consisting of a tract of about 200 acres located in the fifth ward of Long Island City, consisting of 2,500 lots, as shown on map, excepting certain specified lots, the same to be the first lien upon said premises and said premises to be clear of any other incumbrance or tax. I agree to accept at the value of \$10,000 the row of buildings owned by the Riverhead Savings Bank as part payment of said mortgage.

"I agree to pay five per cent as commission, out of which all searches of title and incidental expenses to be paid except the procuring of the tax bills, which expense, if any, I will pay.

"Said mortgage to run for three years, with permission to pay not to exceed \$20,000 in each year on account of the principal. When such payments are made releases must be given only upon receipt of one-half of the value of the premises to be released, said mortgagee to be paid \$5 for the execution and delivery of each release.

KATE T. WOOLSEY.

"F. W. SCUTT.

"This money will be obtained in time for Mrs. Woolsey to take advantage of the law of 1895, in respect to taxes, or no commission will be charged.

"Dated L. I. CITY, Aug. 16, 1895.

"F. W. SCUTT."

The plaintiff subsequently negotiated a loan with the Riverhead Savings Bank for \$80,000, which was afterwards increased to \$85,000, at the request of the defendant. The defendant refused to accept the loan or to execute the bond and mortgage, for reasons which will hereafter appear. The court submitted the issues to the jury, which returned a verdict for \$4,225, but at the suggestion of the plaintiff's counsel that his complaint demanded judgment only for five per cent on the amount of the original loan, namely, \$4,000, the verdict was reduced to that sum. A motion was made for a new trial and, being denied, the defendant appeals from that order.

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The defendant had been the owner of the property for over twenty-five years, during which time the taxes had accumulated to an amount supposed to be about \$80,000, and it was for the purpose of raising money to pay off these taxes that the defendant applied for the loan in question. By an act of the Legislature, passed in 1895 (Chap. 782, Laws of 1895), all arrears upon the premises in question could be paid before September 1, 1895, at the nominal interest of two per cent, and provision was also made that the greater portion could be paid as late as December 31, 1895, at the same rate of interest, and there is ample evidence to show, as the language of the agreement itself imports, that the conditions of the contract were calculated to meet the requirements of this statute. When the contract was originally made it seems to have been assumed by the parties that the larger sum named in the contract, \$80,000, would be sufficient to pay the taxes and the five per cent commission of the plaintiff, but an examination of the records disclosed the fact that this sum was insufficient, and accordingly the amount of the loan was increased to \$85,000. As the defendant was to accept at the value of \$10,000 a row of buildings owned by the Riverhead Savings Bank, as a part of the money to be covered by the mortgage, there was left to pay taxes only the sum of \$75,000. Adding to this amount the \$4,000 commission, it became evident that the loan was inadequate to clear the property of the incumbrances, and it is a fair inference, from all the evidence in the record, that it was for this reason alone that the defendant refused to complete the loan. She subsequently obtained from the Washington Insurance Company a loan of \$90,000.

It is not improbable also that the defendant repented of her bargain to purchase the row of buildings for the price named, and, therefore, sought occasion to refuse to complete the transaction. The refusal was, by herself and her attorney, based solely upon the ground that it was the duty of the bank and its attorney to obtain searches and estimates showing the exact amount of the taxes, which they had failed to do, and that, therefore, it was not made certain that the amount of the loan was sufficient to pay the agreed consideration for the row of houses, the taxes and the commission, and that until this was done she was not legally obliged to accept the loan.

We are thus brought to decide whose duty it was under the con-

tract to furnish these searches and estimates. The defendant contends that it was the duty of the plaintiff or the bank, but I do not think such a construction is justified by the general language of the contract, and in this view I am confirmed by the peculiar language of the clause relating to commissions, by which the plaintiff was to pay "all searches of title and incidental expenses, * * * except the procuring of the tax bills, which expense, if any, I (the defendant) will pay." Without this clause it would have been the duty of the defendant to discharge the premises from the lien of the taxes before the bank could be required to advance the money upon the loan or to secure the bank for such payment; but the clause already stated gives additional force to this obligation on the part of the defendant, as the searches were to be procured for her and at her expense. To my mind the refusal to complete the loan indicates the desire and intention of the defendant to discover some pretext, however trivial, which would apparently justify her refusal to complete the loan. But this attempt, although fortified by the opinion of learned counsel, cannot be justified. The bank was "ready, able and willing" to make the loan specified in the contract and in its subsequent modification, and this being true, the plaintiff had complied with the terms of his contract and was entitled to his commissions. This proposition meets the contention of the defendant's counsel that there was error in the charge of the learned judge below in stating that in order to entitle the plaintiff to his commissions he must establish the fact that he had procured a party "able and willing" to make the loan named in the contract. The learned counsel, in support of this proposition, excepts a single sentence of the charge, unmindful of its context. The court distinctly charged, in the language of the case relied upon by the defendant's counsel (*Ware v. Dos Passos*, 38 N. Y. Supp. 673), as follows: "If this bank was *ready and willing and able* to make this loan, you are obliged in law to find a verdict for the plaintiff for this amount." It is true that the court in the very next sentence charged: "The law is that if he procured a corporation or person ready and willing to make the loan according to the terms of the contract," the plaintiff was entitled to recover; but the connection between this and the previous sentence, where the court had correctly stated the law, is so close that the two must be read together as one statement.

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A further objection is made by the defendant that when the parties met to complete the loan there was no proper tender either of the amount of the loan or of the proper bond and mortgage; but there is testimony tending to show that the bank was ready and prepared with the necessary funds, and that the bond and mortgage had been prepared and was presented to the defendant for execution. It does appear that, while by the terms of the contract the loan was to be for three years, the condition of the bond provided for its payment in one year, and the mortgage provided for its payment in three years. It is probable that this difference was a clerical mistake, and it is sufficient answer to this contention that no such objection was made at the interview, that the attention of the parties was not drawn to the matter, and that the only objection made by the defendant to the completion of the transaction was that neither the plaintiff nor the bank had procured searches or estimates showing the exact amount of the taxes which were a lien upon the property, so that the defendant might know that the loan would provide her with funds adequate to their discharge. This, as we have already decided, was a duty incumbent on the defendant and not upon the plaintiff.

We think the grounds of her refusal were a pretext and not a just reason for her action, and that her refusal to complete the loan cannot defeat the right of the plaintiff to the commissions named in the agreement.

The judgment is affirmed.

All concurred.

Judgment and order affirmed, with costs.

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JOHN T. ALLAIRE and THADDEUS H. ALLAIRE, Respondents, v.
MOSES KALFON and MARCUS NAHON, Appellants.

Libel—order of arrest in a civil action for libel—what is a final decision within the meaning of the undertaking that the plaintiff was “not entitled to the order of arrest”—vacation of the order on the merits.

Where, on obtaining an order of arrest in a civil action for libel, an undertaking is given providing for the payment of all damages and costs which the defendants may sustain by reason of the order, in case they obtain judgment, “or if it is finally decided that the plaintiff is not entitled to the order of arrest,” the dismissal by the tribunal of last resort of an appeal from an order affirming the vacation of the order of arrest, is a final decision that the plaintiff was not entitled to the order of arrest within the meaning of the undertaking.

Under what circumstances it will be presumed that the order was vacated on the merits, considered.

APPEAL by the defendants, Moses Kalfon and Marcus Nahon, from an interlocutory judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of Kings on the 15th day of March, 1897, upon the decision of the court rendered after a trial at the Kings County Special Term overruling their demurrer to the complaint.

Abraham L. Fromme, for the appellants.

E. H. Benn, for the respondents.

WILLARD BARTLETT, J. :

The appellants are sued upon an undertaking which they gave in order that the respondents might be arrested in a civil action for libel, brought against them in the City Court of New York by one Bernard Kreizer. Thereby the sureties did “jointly and severally undertake that if the defendants in the said action do recover judgment therein, or if it is finally decided that the plaintiff is not entitled to the order of arrest, the said plaintiff in said action will pay all costs which may be awarded to the said defendants, and all damages which they may sustain by reason of the arrest in said action, not exceeding the sum of two hundred and fifty dollars.” The order of arrest was vacated upon motion at a Special Term of the City Court. The order of the Special Term was affirmed at General

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Term. An appeal was then taken to the Appellate Term of the Supreme Court in New York, which is the tribunal of last resort in such cases, and there the appeal was dismissed.

The respondents rely upon this disposition of the order of arrest as a final decision that Bernard Kreizer, the plaintiff in the City Court action, was not entitled to such order. The appellants, on the other hand, contend that in a libel suit, where the right to arrest depends upon the nature of the action, it cannot be finally decided that the plaintiff was not entitled to the order of arrest until the action itself is determined, and, hence, that the complaint upon the undertaking is insufficient, because it does not allege that the defendant in the libel suit (the respondents Allaire) have recovered judgment therein.

I think that the complaint sets out a cause of action. The conditions which are to render the sureties liable are stated in the undertaking in the alternative. One is the rendition of judgment in favor of the party arrested. The other is a final decision that the plaintiff was not entitled to the order of arrest. When the order of arrest has been vacated, and the highest tribunal to which any appeal lies has affirmed the *vacatur*, it certainly must be deemed "finally decided that the plaintiff is not entitled to the order of arrest," within the meaning of the alternative provision of the undertaking. The order of arrest is then gone forever, though the litigation itself may last for years; and it is gone by virtue of an adjudication from which there is no further appeal.

Substantially the same question has been decided in the same way by the General Term of the Court of Common Pleas in New York, in the case of *Squire v. McDonald* (2 Misc. Rep. 422) where it is held that an action upon the undertaking will lie when the order of arrest has been vacated upon the merits and the time to appeal has expired. The cases of *Schuyler v. Englert* (10 Daly, 463), and *Rothwell v. Paine* (9 Civ. Proc. Rep. 128), upon which the appellants here rely, are there cited in the opinion of Bischoff, J., who points out that they contain merely dicta, so far as they tend to support a conclusion adverse to that at which he and his associates then arrived in *Squire v. McDonald* (*supra*).

It is said, however, that the case last cited differs from that at bar by reason of the fact that the complaint before us does not show

that the order of arrest was vacated upon the merits. I do not think the difference is essential. The order of the Special Term of the City Court, which is attached to the complaint and made a part thereof, shows that the order of arrest was vacated and set aside upon a motion whereon were read the pleadings and affidavits on both sides; and there is nothing to indicate that the motion was based upon any irregularity. Under these circumstances, I think the presumption is that the order was vacated on the merits. This presumption would be strengthened if we were at liberty to take into consideration a memorandum report of the affirmance by the General Term, where it is said: "Per Curiam: The order of the Special Term justice is affirmed for the reason that the complaint and other papers used upon this motion, and upon which the order of arrest was granted, disclose no cause of action against defendants." (*Kreizer v. Allaire*, 14 Misc. Rep. 653.)

The interlocutory judgment should be affirmed, with costs, but with leave to the defendants to answer on payment of costs.

All concurred.

Interlocutory judgment affirmed, with costs, but with leave to the defendants to answer within twenty days, on payment of costs of the demurrer and of this appeal.

HERBERT NOBLE, as Assignee for the Benefit of Creditors of SUMWALT & JONES, Appellant, v. HENRY C. EULER, Respondent.

Corporation — annual report of a corporation verified by the president only, when sufficient — acceptance of a resignation not essential to its effectiveness.

Where the treasurer and secretary of a corporation has tendered his resignation, and the president of the corporation, pursuant to its by-laws, has exercised the duties and functions of treasurer and secretary, the filing of a report conforming in all respects to the requirements of section 30 of the Stock Corporation Law (Chap. 688, Laws of 1892), except that it is verified by the president alone, instead of "by the oath of the president or vice-president and treasurer or secretary," as required by the statute, constitutes a substantial compliance with the statute, and an action brought under that section to charge the directors of the corporation with liability for its debts, based upon the theory that there was a failure to file a report, cannot be maintained.

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The fact that the resignation of the treasurer and secretary was not formally accepted until after the filing of the report is immaterial, as the acceptance of a resignation is not essential to its effectiveness.

APPEAL by the plaintiff, Herbert Noble, as assignee, etc., of Sumwalt & Jones, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Westchester on the 25th day of May, 1897, upon the report of a referee.

William H. Page, Jr., and *Edward J. Gavegan*, for the appellant.

Jesse Johnson and *Bernard J. Isecke*, for the respondent.

PER CURIAM :

This action was brought to charge the defendant with liability as a director of the F. J. Kaldenberg Company, for a debt of that corporation, on account of its failure to file the annual report required by section 30 of the Stock Corporation Law (Laws of 1892, chap. 688).

The corporation did file a report in the proper offices within the time prescribed by the statute; but the plaintiff contends that this document is to be deemed a nullity, because it was verified by the oath of the president only, and not also by that of the treasurer or secretary.

The office of treasurer and secretary of the F. J. Kaldenberg Company was vacant at the time when the report was made, in January, 1892, by reason of the resignation of the treasurer and secretary in the month of November, 1891. Although this resignation was not formally accepted until February, 1892, the referee correctly held that it became effective when tendered in the previous November. It also appeared that after the resignation and at the time when the annual report was made and filed, the president of the corporation exercised and discharged the duties and functions of treasurer and secretary pursuant to the by-laws. When the report was made, therefore, the person who verified it was to all intents and purposes the president, secretary and treasurer of the F. J. Kaldenberg Company; and the single verification by him, although it referred only to his office as president, was a substantial compliance with the

requirements of the Stock Corporation Law that such report should be "verified by the oath of the president or vice-president and treasurer or secretary."

This is the result reached by the learned referee, whose reasoning is so convincing, and whose conclusions are so fully sustained by the authorities which he cites, that we are quite content to base our affirmance of the judgment upon his opinion on this branch of the case.

We do not deem it necessary to decide the question which he also discusses, as to the application of the Statute of Limitations.

All concurred.

Judgment affirmed, with costs.

The following is the opinion of the referee :

ALMET F. JENKS, Referee :

Plaintiff, as assignee for the benefit of creditors of Sumwalt & Jones, assignees of an indebtedness of the F. J. Kaldenberg Company, a domestic corporation, sues defendant, formerly a director of said corporation. The indebtedness accrued between September 1, 1892, and January 20, 1893. On the trial the defendant moved that the plaintiff elect upon which cause of action he desired to stand; and thereupon the plaintiff, without resisting the motion, elected "to stand on the first cause of action, to wit, that the said corporation did not at any time during the year 1892 make an annual report as required by law, and did not during that year file any report either in the office of the Secretary of State or in the office of the clerk of Westchester county, as required by section 30 of the Stock Corporation Law." It is not disputed that the corporation did in fact attempt to obey the statute, in that a paper, purporting to be a report, was filed, but it is contended that such paper did not comply with the section in question, for the sole reason that it was not verified by the secretary or the treasurer of the corporation and that, therefore, this action lies. It is well settled that this action is brought to recover a penalty that is measured by the indebtedness of the corporation to the plaintiff. (*Gadsden v. Woodward*, 103 N. Y. 244; *National Bank v. Dillingham*, 147 id. 603, 609.) And in *Stokes v. Stickney* (96 N. Y. 323) such an action is

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classified among those usually designated as actions *ex delicto*, and in *Rogers v. Decker* (131 N. Y. 490) it is said that the liability is one "created anew by the statute in the form of a penalty for specific acts of disobedience." Being thus penal in its character, the section should be strictly construed. Thus in *Whitney v. Cammann* (137 N. Y. 342) the court, in discussing this provision in its form as it then existed, say: "It has been often held that this statute was highly penal and to be construed according to the rules of construction applicable to such statutes, not to be extended by construction or made to embrace cases not within the language used." (See, also, *Garrison v. Howe*, 17 N. Y. 458; *Wallace v. Walsh*, 125 id. 35; *Whitaker v. Masterton*, 106 id. 277; *Brackett v. Griswold*, 103 id. 425; *Whitney Arms Co. v. Barlow*, 63 id. 62.)

It is not claimed that the plaintiff incurred loss in consequence of the form of the report as filed, but the case rests upon a strict technicality. The omission of any verification to the report by either secretary or treasurer was not due to inadvertence or careless disregard of the statute, much less to any specific act of disobedience. On the contrary, it is clearly established that there was no secretary and treasurer or secretary or treasurer, in the sense of a separate officer, throughout the time prescribed for the making and filing of the report. In November, 1891, Mr. Eberhard Faber, then secretary and treasurer, resigned in writing to the president of the corporation, "said resignation to take effect immediately." He stated at the time that his own business was very pressing, and that he had no time to devote to the duties of the offices. The president accepted the resignation, in accord with a provision of the by-laws, and thereafter and until the close of February, 1892, no successor in either office was elected, but the duties of those offices devolved upon the president and the vice-president under the by-laws, the duties of the treasurer being, however, wholly discharged by the president. It appears, too, that on account of certain absences in California and in Europe it was impossible to assemble a quorum in meeting to fill the vacancies, though several attempts were made, at any time earlier than February twenty-ninth. Plaintiff lays stress upon the fact that when a quorum was obtained at the February meeting, the minutes of that meeting show that the resignation was received and accepted, and an election of a treasurer was then had.

But it is well settled that acceptance of a resignation is not essential to its effectiveness. (*Wilson v. Brentwood Hotel Co.*, 16 Misc. Rep. 48; *Chandler v. Hoag*, 2 Hun, 613; *affd.*, 63 N. Y. 624; *Smith v. Danzig*, 64 How. Pr. 320; *Bruce v. Platt*, 80 N. Y. 379; *Briggs v. Spaulding*, 141 U. S. 132.) The testimony is that subsequent to the resignation made to the president and its acceptance by him, Mr. Faber thenceforth ceased to perform any duties of either office. Plaintiff sought to meet this by reading in evidence an indorsement "Canceled Feb. 27, 1892, E. F.," made by Mr. Faber on one of the stubs in the stock certificate book. It did not appear, however, that this was made by Mr. Faber, either as secretary or treasurer, while it is entirely natural that, still being a director of the corporation, the entry may have been made by him in such capacity or written as a memorandum by one still having an interest in the administration of affairs. During the vacancies in question, intervening November, 1891, and February 29, 1892, section 30 required that the report should be made and filed, and a report conforming in all respects to the statute, save as noted above, was made, signed and verified, and then submitted to the counsel of the company, the Hon. Clarence Lexow, who looked it over and caused it to be duly filed in duplicate. There was then neither secretary nor treasurer as a distinct officer of the corporation throughout the time prescribed for making and filing the report. This defendant could neither force the secretary and treasurer to remain in office after his resignation, nor could he alone appoint a successor or successors. Effort was made by the corporation to call meetings, but there were successive failures to obtain a quorum within the time during which the report was required by the statute. It does not appear that this defendant was an absentee, or failed, so far as in him lay, to fulfill his duties as a director. The presumption is that he did discharge them. On the contrary, he did unite in making the report, and, therefore, in this respect was not guilty of any act or omission, much less of "any act of specific disobedience." And I am of opinion that the plaintiff cannot rest any part of his case in this action upon the fact that on account of the absence of certain directors the corporation could not fill the vacancies until a time subsequent to the period prescribed for the making and filing of the report. (*Wallace v. Walsh*, 125 N. Y. 26, 34.) Indeed, the corpora-

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tion did not cease to perform any of its functions, but the president acted for a time as the secretary and the treasurer, and in so doing there was no violation of statute or of by-law.

Thus far I have assumed that section 30 required the verification of two officers of the corporation, and such I think is its purpose. But it has been contended before me, and with considerable force, that the statute is susceptible of a different construction, or rather different constructions without violence to sense or syntax. The section, as it stood in chapter 564 of the Laws of 1890, as amended by chapter 2 of the Laws of 1892, required the verification by the president or vice-president and secretary or treasurer, and when chapter 2 was repealed the officers last named were continued in the section as it now stands in chapter 688 of the Laws of 1892. It is argued that the section may be read as requiring the verification of the president alone or the verifications of the vice-president and treasurer, or the verification of the president, or of the vice-president, or of the secretary, or of the treasurer. To permit of the last reading the word "or" must be substituted for "and," but such a substitution is not infrequent, and as between these two words, "their strict meaning is more readily departed from than that of other words and one read in place of the other in deference to the meaning of the context." (Sutherland on Stat. Const. § 252.)

An argument for the construction that the Legislature intended to require but the verification of the president or of a single officer is found in the fact that the section reads "and verified by the *oath* (not oaths) of the president or vice-president." And it may be replied to the answer that "oath" should be construed "oaths" that "and" may as well be construed "or." This particular change in the section is comparatively new, and I find no judicial interpretation thereof by any Appellate Division or by the Court of Appeals. It may well be that lawyers might differ over the true interpretation, and respectable arguments be made by each disputant. Mindful that it is penal in its character, the language of NELSON, J., in *Hicks v. Minturn* (19 Wend. 550) may be cited. "The act had never been under the observation of the court, and its meaning in respect to the point wherein the defendant erred, presented a case

for construction about which the legal profession might well differ, and where, of course, it would be most unjust to hold that a layman must decide correctly at his peril. (4 Burr. 2060, 63; 3 Camp. 17; 58 Mass. 7.)” It is entirely possible, then, that the directors and the officers might have read the statute as requiring but the oath of the president. Indeed, it appears that this report was submitted to counsel and passed upon by him, and if it had been disapproved as to form, it was not difficult to have him who was then president *and* treasurer, for the one individual at that time discharged the two offices, add to his first verification, as president, a second verification as treasurer.

I think that the statute has met a substantial compliance.

The purpose of the statute is to protect creditors and to afford information to them and to others dealing with the corporation as to its financial condition and standing. (*Wallace v. Walsh*, *supra*; *Whitney v. Cammann*, *supra*.) To that end the duty of making a report is cast upon the majority of the governing or managing board of the corporation. (*Bolen v. Crosby*, 49 N. Y. 183.) No other officer makes the report or joins with the majority of the directors in the performance of this duty. All that serves to protect or to apprise creditors or others who may be interested in the financial condition and standing of the corporation is set forth by the majority of the directors over their names. The verification required of the officers is to add the sanctity of an oath to the report of the directors as evidence of its veracity under the penalty of perjury if the officers swear falsely. Not only then was the information required by the statute duly set forth by the proper officer, but the verification of the only officer of those named in the statute, who then existed, was duly annexed. An inquirer would find all that the statute afforded to him verified by an oath which, if false, would sustain an indictment for perjury. If the absence of further verification put him to inquiry he would find that such absence was not due to contumacy, refusal or dissent of that officer, but simply to the fact that there was none, at least as a separate official. In *The International Bank v. Faber* (U. S. C. C., Eastern District of New York [79 Fed. Rep. 919]), WHEELER, J., passing upon this identical report, said: “Further, I am of opinion that the statute has received substantial compliance in the execution of the report filed by the corpora-

tion." In fact the president of the corporation was also its secretary and treasurer at the time that the report was made, and his verification as secretary or treasurer, in addition to that as president, could, in the words of HARDIN, P. J., in *Novelty Manufacturing Co. v. Connell* (88 Hun, 257), have added nothing to the essential evidence of the truth of the report. This precise question was also passed upon in *The International Bank v. Faber* (*supra*), and WHEELER, J., in giving judgment for the defendant, said: "The law does not require performance of impossibilities. The defendant could not, after resignation, reinstate himself as secretary or treasurer, and cannot be liable for not doing that. No secretary or treasurer could verify the reports, for there was none to do it. It was verified as the law required, so far as there were officers for the law to apply to, and beyond that the law would be as well attained by the verification made as by anything further in that direction." *Novelty Mfg. Co. v. Connell* (88 Hun, 254) is also an authority that there was compliance with the statute.

And it is to be remembered that this action is, in the language of FINCH, J., in *Rogers v. Decker* (*supra*), "in the form of a penalty for specific acts of disobedience," and as such to be strictly construed. The policy of the law is neither to punish an honest mistake in the interpretation of a statute (*Jones v. Butler*, 143 N. Y. 55), nor the shortcomings of an innocent and willing officer who has to the full extent of his power conformed to the statute. (*Butler v. Smalley*, 101 N. Y. 71; *Vincent v. Sands*, 58 id. 673; § 30, chap. 688, Laws of 1892, 1st clause.) And I do not think it can be said that this defendant was bound, at his peril, to act under such final clause, inasmuch as a report was made and verified to the extent of the possibilities, and was, therefore, not a nullity. (*Bonnell v. Griswold*, 80 N. Y. 128.) Therefore, there was neither "refusal nor neglect" within the meaning of this provision.

Here, then, as I have said, a report was filed which set forth all of the statements prescribed by the statute, made by the designated officers, and verified by such of the officers as were in existence at the time, and indeed by the officer who was then at once the president and the secretary and treasurer, and who, therefore, by his verification, met the requirements of the statute. If he had made the one verification as treasurer or secretary as well as president, not even a

technicality could be available to the plaintiff. The plaintiff being not harassed or misled, the whole purpose and object of the statute as to him met compliance and he has no standing which calls for the enforcement of this *quasi penal* action against the defendant. In the words of BARTLETT, J., in *Jones v. Butler (supra)*, "To permit such a recovery would be to make shadow substance, and allow technicality to work injustice."

The defendant also shields himself with the Statute of Limitations and insists that the lapse of *two years* is a bar to such an action. The indebtedness in suit accrued between January 1, 1892, and January 20, 1893. The Stock Corporation Law provides, at section 55, "No action shall be brought against a stockholder after he shall have ceased to be a stockholder for any debt of the corporation, unless brought within *two years* from the time he shall have ceased to be a stockholder." In *The National Bank v. Dillingham* (147 N. Y. 603) it was held that the term "stockholder," as employed in the section quoted, included a director. "The directors are, of course, stockholders, and it is reasonable to assume that it was not intended to charge them with personal liability on any other conditions than apply to all the members of the corporation." The defendant ceased to be a stockholder upon the dissolution of his corporation (*Hollingshead v. Woodward*, 107 N. Y. 96), and the order of dissolution was entered on September 23, 1893. In *The Bank of Metropolis v. Faber* (150 N. Y. 200) the head note in part sets forth that an action similar to this now under consideration "lay in October, 1895, under the laws then in force, * * * for a debt of the corporation contracted in December, 1892, by reason of the failure of the directors of the corporation to make and file any report during the year 1892," but it is true that such decision disposes of a demurrer, and it does not appear that the question of the Statute of Limitations was discussed on that appeal. I hold that the decision in *National Bank v. Dillingham* (147 N. Y. 603) should be followed. There should be judgment for the defendant.

SAMUEL D. MORRIS and SAMUEL S. WHITEHOUSE, Respondents, v.
THE BROOKLYN HEIGHTS RAILROAD COMPANY, Appellant.

Evidence — testimony as to a statement by the advisory counsel of a corporation (made at a date subsequent to a settlement) as to the terms of such settlement, not admissible as against the corporation.

Upon the trial of an action brought against a railroad corporation to recover for services rendered by a firm of attorneys in the compromise of certain actions, the question was presented as to whether, by the terms of a settlement made on April 4, 1896, compensation for such services was included in a sum paid to the firm under such settlement. The firm proved by one Collin, an attorney, who together with one Lewis, at the time of the settlement, represented the railroad, that at a meeting held in July, 1896, between the parties who had conducted the settlement, a memorandum was produced by Lewis which was stated by him to have been made at the time of the settlement, which recited that the firm was to be paid the reasonable value of the services to be rendered by it in the compromise of the cases.

Held, that as, at the time of the reading of the memorandum, Lewis was not acting in the discharge of any duty which he owed to the railroad in respect to the settlement of the claim, his declarations made at that time were inadmissible against the railroad, and that testimony as to the contents of the memorandum was inadmissible.

APPEAL by the defendant, The Brooklyn Heights Railroad Company, from a judgment of the County Court of Kings county in favor of the plaintiffs, entered in the office of the clerk of the county of Kings on the 23d day of March, 1897, upon the verdict of a jury, and also from an order entered in said clerk's office on the 19th day of April, 1897, denying the defendant's motion for a new trial made upon the minutes.

Jesse Johnson, for the appellant.

Morris & Whitehouse, for the respondents.

PER CURIAM:

In this action the plaintiffs, who are attorneys and counselors at law, have recovered \$800 from the defendant for professional services rendered to that corporation in negotiating and bringing about the compromise and settlement of a number of litigations. The defendant does not deny that the services were performed, nor make

any question as to their value; but on the present appeal it insists that errors were committed in the admission of evidence which demand a reversal of the judgment.

In the spring of 1896, when the plaintiffs ceased to be the attorneys of the defendant corporation, their claims against the company were adjusted largely through the instrumentality of Mr. Daniel F. Lewis, who was then in the employ of the corporation in an advisory capacity, and Mr. Charles A. Collin, one of its new counsel. Their negotiations were carried on principally with Mr. Whitehouse, one of the plaintiffs, and resulted in an adjustment under which the plaintiffs received a large sum of money. According to all the persons who directly participated in this adjustment, some agreement was made on the part of the plaintiffs in respect to such services as they might thereafter render in regard to the settlement of suits then pending. As Mr. Lewis and Mr. Whitehouse remember this agreement, it was that the plaintiffs should be paid a reasonable compensation for such services. According to Mr. Collin's recollection, however, the arrangement did not contemplate any additional payment for what might subsequently be done by the plaintiffs in settling litigations.

The substantial question at issue between the parties in the present action, therefore, was whether the plaintiffs' future services in the settlement of suits were paid for by the lump sum which they received in the adjustment of their large account, or whether such services were to be the subject of separate compensation.

Upon this issue it was, of course, competent to show by the testimony of Messrs. Whitehouse, Lewis and Collin just what happened, according to their recollection, at the time of the adjustment of the large account, which seems to have been finally concluded on April 4, 1896. The plaintiffs' present claim for additional compensation became the subject of controversy about July, 1896, and there being a difference of recollection between Mr. Whitehouse and Mr. Collin as to what had occurred in April, these gentlemen went to the office of Mr. Lewis and conferred with him in respect to the terms of the original adjustment. On the trial of the present action Mr. Collin was called by the plaintiffs as a witness in their behalf, and was examined in respect to this July interview. Being questioned in regard to what happened upon that occasion, he testified that Mr.

Whitehouse told Mr. Lewis that he and the witness differed in their recollection of the terms of the settlement as to the services that were to be rendered by Morris & Whitehouse after the adjustment of April fourth, and that they would like to have him give his statement of the terms of that settlement as he remembered them. The witness then went on to say that Mr. Lewis produced a memorandum, stating that he had made it at the time, and proceeded to read from it. This memorandum thus read specified what the plaintiffs were to be paid for certain cases on appeal which they were to argue, and furthermore recited that for the services which the plaintiffs should perform in regard to the settlement of cases they were to be paid a reasonable value. Mr. Collin testified also that he told Mr. Lewis that his recollection was that there was to be no charge for settling any case, but that the charge for future services was to be only where cases were argued by the plaintiffs in the Appellate Division. Mr. Whitehouse said to Mr. Lewis that his construction was substantially the same as that shown by the memorandum, whereupon Mr. Collin said that he would hardly expect to set up his memory against the memorandum of Mr. Lewis, but that was his recollection.

As we understand the objection and exception at folio 53 of the appeal book, they are broad enough to apply to all this evidence, and, if so, we think its reception was error for which the judgment must be reversed. At the time that Mr. Lewis was thus reading from his memorandum his own version of what took place between him and one of the plaintiffs several months before, he was not acting in the discharge of any duty in behalf of the defendant corporation in respect to the settlement of the plaintiffs' claim. We can see no theory upon which this testimony was received as to the contents of this memorandum, unless it be that the reading of it was an admission or declaration by an agent of the corporation, which was made under such circumstances as to be binding upon it. But it was not thus made. There is not a word in the record to indicate that, at the time of this July interview, at which the contents of the memorandum were read, Mr. Lewis was even assuming to act for the Brooklyn Heights Railroad Company in reference to the plaintiffs' claim. He was not engaged in any transaction on the part of the company, nor was he employed in any agency in its

behalf which made his declarations admissible against the defendant. (*Manhattan Life Ins. Co. v. Forty-second Street, etc., R. R. Co.*, 139 N. Y. 146, 151.)

The judgment should be reversed and a new trial granted, costs to abide the event.

All concurred, except GOODRICH, P. J., not sitting.

Judgment reversed and new trial granted, costs to abide the event.

FREDERICK HALL WHITE, an Infant, by FREDERICK T. ALDRIDGE, his Guardian ad Litem, Respondent, v. JOSIAH J. WHITE, Appellant.

An ante-nuptial contract made in a foreign State—when a bar to a tenancy by the curtesy—the contract inures to the benefit of the wife's devise or heir—a possessory action by the heir entertained in equity—legal priority unnecessary—demand of possession by letter.

An ante-nuptial contract, executed in 1876 in the State of Connecticut, by the terms of which a husband agrees that he "will not claim to have or pretend to have any right or interest in or to any part of her (his wife's) said estate or of said income, but will permit the same to pass by her will to her devisees, or by descent to her heirs at law, as the same would pass if she had remained single and unmarried," is valid, and constitutes a bar to any tenancy by the curtesy upon the part of the husband in the lands of the wife in the State of New York. Where no proper objection thereto is made upon the trial, a court of equity will entertain an action, in form one of ejectment, brought, at the instance of the guardian of the property of the sole infant heir of the wife, to enforce the ante-nuptial agreement and to compel the husband to surrender possession of the wife's estate.

In such a case the failure of the husband to reply to a letter written to him by the guardian demanding possession of the premises, is sufficient to sustain a finding of unlawful possession by the husband.

The rule that legal priority must exist between the promisee and a third party in order to enable the latter to sue upon a promise alleged to have been made for his benefit, does not apply to ante-nuptial contracts or to agreements of a similar nature. Such an ante-nuptial contract must be regarded as made for the benefit of any person to whom the wife's property passes by devise or descent.

APPEAL by the defendant, Josiah J. White, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 12th day of June, 1897,

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upon the decision of the court rendered after a trial at the Kings County Special Term.

Josiah T. Marean, for the appellant.

George S. Ingraham, for the respondent.

WILLARD BARTLETT, J. :

The plaintiff in this action is a lad thirteen years of age, who lives with his father, the defendant, at No. 136 Columbia Heights, in the city of Brooklyn. The house in which they live formerly belonged to Eliza T. White, the wife of the defendant and the mother of the plaintiff. Mrs. White died intestate on the 23d day of October, 1891, seized and possessed of the premises, and leaving the plaintiff her only child and heir at law. The father, however, claims to be entitled to the possession of the property during his own lifetime as tenant by the curtesy, and the present litigation was instituted at the instance of the Long Island Loan and Trust Company, as guardian of the plaintiff's estate, to determine the validity of the defendant's claim in this respect. The guardian insists that the defendant, by virtue of an ante-nuptial agreement with the plaintiff's mother, deprived himself of all right to any interest in the property as tenant by the curtesy, and that the infant's willingness to have his father remain in possession does not affect the right or duty of the guardian to recover the real estate of the ward.

The ante-nuptial agreement upon which the plaintiff relies was executed in Connecticut, on the 27th day of June, 1876, between Josiah J. White and Eliza T. Hall. It recites the ownership by the said Eliza T. Hall of certain real property situated in the States of Connecticut, Wisconsin and New York, and declares, in behalf of the said Josiah J. White, that in case of the death of Eliza T. Hall while she is his wife, he "will not claim to have or pretend to have any right or interest in or to any part of her said estate or of said income, but will permit the same to pass by her will to her devisees, or by descent to her heirs at law, as the same would pass if she had remained single and unmarried."

In form the suit is an action of ejectment. The complaint alleges the appointment of the guardian *ad litem*; the ownership of the

premises No. 136 Columbia Heights by Eliza T. Hall at the time of the execution of the ante-nuptial agreement; the execution of said agreement; the subsequent marriage of the parties thereto; the birth of the plaintiff and the death of his mother; the appointment of the Long Island Loan and Trust Company as guardian of the plaintiff's property and estate, and, finally, the possession of the premises by the defendant and the unlawful withholding of the same. Judgment is demanded "for the recovery of said property in fee simple and for the possession thereof, and the costs of this action."

In the answer the defendant "denies that plaintiff has an estate in fee simple in the premises described in the complaint, except in reversion after the life of this defendant, and denies that plaintiff is entitled to the possession thereof; and also alleges that the defendant is seized of an estate for his own life in said premises, and is entitled to the possession thereof." The defendant further denies that he unlawfully withholds the possession of said premises from the plaintiff. Upon the issues thus presented the parties went to trial before one of the justices of the Supreme Court at Special Term, without a jury. It was proved that on March 31, 1897, the Long Island Loan and Trust Company, as guardian of the plaintiff's estate, sent a letter to the defendant, which was received by him, demanding that he surrender the house No. 136 Columbia Heights, then occupied by him, into the possession of the said company as such guardian. The defendant made no reply to this communication. It appeared that just after the marriage of Mr. and Mrs. White they came to the State of New York, and resided here until the time of Mrs. White's death; that when Mrs. White died she and her husband and son were living in the house No. 136 Columbia Heights, and that the father and son have continued to live there ever since, and, at the time of the trial, were living there together as members of the same family. The plaintiff was called as a witness, and testified that he did not wish to live anywhere else; that he did not want his father removed from the house, and that the suit was brought without his consent. The learned trial judge took the case under advisement, and subsequently made findings in substantial accordance with the allegations of the complaint, upon which judgment was entered declaring the plaintiff to be the owner

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of the premises and entitled to the possession thereof, and adjudging that he recover such possession from the defendant, together with his costs.

Treating the suit as an action of ejectment, the learned counsel for the appellant insists that the complaint should have been dismissed by reason of the failure of the plaintiff to establish any legal title in himself. According to his argument, the utmost force that can be given to the defendant's ante-nuptial covenant is that of a mere promise which a court of equity might specifically enforce, or for the breach of which a court of law might award damages. As I understand the appellant's contention in this respect, it is that the agreement could not operate, *ipso facto*, to change the law of the State so far as Mrs. White's lands were concerned, and deprive her surviving husband of his tenancy by the curtesy; but if he loses that right at all, it must be by virtue of some proceeding in equity to enforce the promise which he made to his wife before their marriage.

It would seem that the counsel who drew the complaint intended to sue in ejectment, and in the statement of facts which precedes the Special Term opinion the action is expressly denominated an action of ejectment. The case was tried, however, at Special Term without a jury, just as equity suits are always tried, and there is nothing in the record to indicate that the point now made was brought to the attention of the trial court. If the objection is a good one, it will compel us to order a new trial merely because the plaintiff has made the mistake of suing at law instead of suing in equity; for it is perfectly clear under the authorities that equity can afford the desired relief and ultimately give to him or his guardian the possession of the property.

The equitable power of the Supreme Court in the enforcement of ante-nuptial contracts is very fully considered in the case of *Johnston v. Spicer* (107 N. Y. 185); and it is there said that, "if the contract is fair and reasonable and such as it is lawful for the parties to make, and the rights of creditors or third persons have not intervened, it will be enforced in equity in such a manner as to accomplish the object which the parties had in view, without reference to the validity of the agreement at law." Under our statutes, however, there is no doubt as to the validity of ante-nuptial contracts.

This was declared by the original act for the more effectual protection of the property of married women (Laws of 1848, chap. 200), and is reiterated in the existing Domestic Relations Law (Laws of 1896, chap. 272, § 23).

To effectuate the intention of the parties to an ante-nuptial agreement, a court of equity will vary the relief granted according to the exigencies of the case, and may declare a trust or decree specific performance, or even award money damages when strictly equitable relief is impracticable. The extent to which a court of equity will go in this respect is aptly illustrated by the case of *Neves v. Scott* (9 How. [U. S.] 196). The suit was instituted by a bill in equity in the Circuit Court of the United States for the district of Georgia. Its purpose was to enforce an ante-nuptial contract for the division of the common property of the parties to the marriage, the plaintiffs claiming to be entitled to a moiety of said property under the agreement. The bill "charged waste and prayed for a discovery and decree that they, the complainants, might be put into possession of one-half of all the property which was owned by John Neves and Catharine Neves." The defendants demurred, and their demurrer was sustained in the Circuit Court, but on appeal to the Supreme Court of the United States the decree was reversed, and it was held that inasmuch as the complainants were the beneficial owners and vested with the equitable title by virtue of the marriage settlement, a court of equity would interpose if need be to compel a trustee of the estate to vest them with the legal title. The important feature of this case, however, in its bearing upon the case at bar, is that it was in its essential nature a possessory suit. What the complainants sought was the possession of certain real property. This appears not only from the statement of the contents of the bill already quoted, but also from the opinion of Mr. Justice NELSON, in which he says: "The bill was filed by the complainants in the court below to obtain the possession of the undivided half of an estate embraced in a marriage settlement between John Neves and Catharine Jewell, entered into in contemplation of marriage, and which shortly afterwards took place."

Now, it seems to me that if an equitable cause of action was stated in *Neves v. Scott*, it is equally possible to hold that an equitable cause of action is stated in the complaint before us. All the

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facts are set out which are necessary to constitute such a cause of action. The case was tried in that branch of the court in which equity causes are cognizable, and the relief granted was substantially the same thing as a decree compelling the defendant specifically to perform his contract. This is a case in which it is peculiarly appropriate that we should ignore the distinction between legal and equitable forms of action, inasmuch as there is no real difference as to the issues to be tried, the tribunal by which they are to be determined or the substantial relief to be granted.

There are two other points in the brief for the appellant which require notice. The answer denies that the defendant unlawfully withholds the premises from the plaintiff, and it is insisted that the failure of the defendant to answer the letter from the guardian demanding possession did not give an adverse character to his occupation. I think the neglect to answer the letter is sufficient to sustain the findings of unlawful possession, when the defendant's silence is considered.

It is furthermore argued that the plaintiff is not in a position to enforce the ante-nuptial promise of the defendant, because such promise was not beneficial to the wife and she was under no obligation to the plaintiff to secure to him her entire estate free from her husband's right of curtesy. As to this point the learned trial judge correctly held that the rule of privity through legal obligation does not apply to ante-nuptial contracts or agreements of a similar nature. (*King v. Whitely*, 10 Paige, 465; *Todd v. Weber*, 95 N. Y. 181.) The ante-nuptial contract in the case at bar must be regarded as having been made for the benefit of any person to whom Mrs. White's property might pass by devise or descent. As she died intestate, it was made for the benefit of the plaintiff as her sole heir at law, and under the case last cited he was clearly entitled to enforce the agreement.

The judgment should be affirmed, with costs.

All concurred.

Judgment affirmed, with costs.

RICHARD A. MCNEELEY, Respondent, v. JOHN WELZ and CHARLES ZERWECK, Appellants, Impleaded with HENRY W. MICHELL and Others.

Liquor Tax Law of 1896 — a liquor tax certificate cannot be levied upon under an execution — construction of a chattel mortgage of a license and its "renewal" — what will be construed to be an action to foreclose it — costs against a defendant claiming to have an interest.

A liquor tax certificate issued under chapter 112 of the Laws of 1896 and a surrender receipt therefor are, neither of them, evidences of debt upon which the Code of Civil Procedure, section 1411, authorizes an execution to be levied.

A chattel mortgage given May 15, 1896, which covers "the right of the mortgagor to a license to sell beer or to a renewal thereof," embraces a liquor tax certificate subsequently issued in renewal of the license under chapter 112 of the Laws of 1896.

A complaint in an action brought to procure a determination as to the mortgagee's rights to the amount of the rebate on the surrender of the liquor tax certificate, considered to be an action to foreclose the mortgage and consequently to bring the subject-matter of the action within equitable cognizance.

What is sufficient to show that a defendant claimed an interest in the subject of the action, and consequently to entitle the plaintiff to costs as against such defendant.

APPEAL by the defendants, John Welz and Charles Zerweck, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 16th day of March, 1897, upon the decision of the court rendered after a trial at the Kings County Special Term.

The complaint in this action asked as relief that the plaintiff be adjudged to be entitled to the rebate upon the liquor tax license certificate which is referred to in the opinion; that the defendants be declared to have no title thereto, and that the plaintiff have judgment for the amount thereof against the defendant Michell.

M. Hallheimer, for the appellants.

George D. Armstrong and *E. D. Benedict*, for the respondent.

WILLARD BARTLETT, J.:

On May 15, 1896, Emil Schiellein, who was then engaged in the business of selling liquor at a place called Ruffle Bar, in Kings

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county, executed to the plaintiff a chattel mortgage to secure the repayment of a cash loan of \$2,200. This mortgage covered furniture, household goods and other personal property used by the plaintiff in his business, and also all his right, title and interest "to a license to sell beer or to a renewal thereof." Schiellein subsequently, on June 23, 1896, obtained a liquor tax certificate from Henry W. Michell, the special deputy commissioner of excise for Kings county, under the new Liquor Tax Law. (Chap. 112, Laws of 1896.) He retained this certificate until October 31, 1896, when he surrendered it to the special deputy commissioner, from whom there then became due to Schiellein a rebate of \$325, but not having the money with which then to pay this rebate, that officer gave him an instrument known as a surrender receipt, stating that the sum of \$325 was payable on the surrender certificate out of any excise money thereafter received from the city of Brooklyn or county of Kings, or in any other manner thereafter legalized. No money has yet been paid on the surrender.

Meantime the appellants Welz and Zerweck had sued Schiellein upon a promissory note for \$600, and had obtained judgment against him upon which an execution was issued, under which a deputy sheriff of Kings county, on October 15, 1896, assumed to levy upon Schiellein's tax certificate and its surrender value. This he did by serving upon Mr. Michell, the special deputy commissioner of excise, a notice in writing informing that officer that he had levied upon all the leviable right, title and interest which Emil Schiellein had on October 1, 1896, or at any time thereafter, in whose hands soever the same might be, in and to a liquor tax certificate then in the commissioner's possession. The deputy sheriff did not see the liquor tax certificate at the time in the commissioner's office, nor was it there in fact, nor did he see any money purporting to belong to Schiellein. The certificate had not yet in fact been surrendered.

Upon the oral argument we intimated a pretty strong opinion that a liquor tax certificate, issued under chapter 112 of the Laws of 1896, was not subject to levy under execution. To this opinion we adhere. Such a certificate does not fall within any class of those evidences of debt upon which the Code authorizes an execution to be levied. (Code Civ. Proc. § 1411.)

That the liquor tax certificate was embraced within the terms of

Schiellein's mortgage to the plaintiff we think is equally plain. As the learned trial judge suggests, the defendant Schiellein, by referring in the mortgage to a renewal of his license, must have had in contemplation its renewal in the only manner possible under the new law, that is, by taking out a liquor tax certificate.

We find no difficulty, therefore, in sustaining the conclusions of the court below to the effect that the appellants took nothing by their attempted levy upon the liquor tax certificate, and that the plaintiff under his mortgage became entitled to the \$325 rebate thereon.

It is not so clear that the plaintiff was entitled to have his rights to this fund determined in equity instead of resorting to a suit at law; but, as the real points of difference between the litigants have been fully and fairly tried out and decided, the judgment should be upheld if there be any reasonable view upon which the equitable jurisdiction of the court can be asserted. We think the action may be regarded as a suit to foreclose the plaintiff's mortgage so far as it related to the liquor tax certificate, and hence as cognizable in equity. Thus viewed, the appellants were proper parties defendant, for the proof that the deputy sheriff attempted to levy on the certificate by direction of their attorney is sufficient to show that they really claimed an interest in the rebate as alleged in the complaint. Indeed, the only denial of this allegation is a statement in the answer that they have no knowledge or information sufficient to form a belief as to the matter, which statement is incredible. A defendant must know whether he makes or does not make a particular claim. Inasmuch, therefore, as the appellants have evidently been persistent in their efforts to obtain a fund to which the plaintiff has established his right, we think the award of costs against them should stand as well as the rest of the judgment.

All concurred.

Judgment affirmed, with costs.

THOMAS FAY, Plaintiff, v. JOHN C. McGUIRE and EDWIN C. LOW,
Composing the Firm of McGUIRE & LOW, Defendants.

*Measure of liability of attorneys representing a mortgage to be a first lien, which
proves not to be so.*

Attorneys who represent to their client that a mortgage which they have obtained for him is a first lien upon certain premises, are liable to the client for the sum he is obliged to pay in order to remove other and prior incumbrances (subsequently found to exist) which the attorneys failed to discover.

The attorneys' liability is not limited simply to a possible difference in ultimate value to be determined by the amount which the client may succeed in collecting on a foreclosure of his mortgage.

SUBMISSION of a controversy upon an agreed statement of facts, pursuant to section 1279 of the Code of Civil Procedure.

Jacob H. Shaffer [*Béla D. Eisler* with him on the brief], for the plaintiff.

McGuire, Low & Burr, for the defendants.

WILLARD BARTLETT, J. :

The question upon which this controversy turns is whether the plaintiff has been damaged in a legal sense by the action of the defendants, who were his attorneys at the time, in representing to him that a mortgage which they obtained for him on certain premises at Hempstead, in Queens county, was a first lien upon the property, ahead of all other incumbrances.

The mortgage was for \$4,000. The plaintiff foreclosed it and the property was sold at the foreclosure sale for \$4,965 to one Benjamin Moore, with whom the plaintiff had previously agreed to take \$4,000 of the price in the form of a purchase-money mortgage, if Moore should become the purchaser. A purchase-money mortgage for that amount was accordingly given to the plaintiff by Moore, who subsequently made a contract to sell the property, but could not do so until he had cleared the title of certain liens and incumbrances which the defendants had apparently failed to discover, and which were prior to the original mortgage obtained by them for the plaintiff.

The amount necessarily expended by Moore for thus clearing the title was \$480. The plaintiff agreed to pay, and did pay, Moore

half of this sum, and he seeks, by the present proceeding, to recover such one-half from the defendants.

It would seem clear that the plaintiff is entitled to be put, as nearly as possible, in the same position as he would now occupy if the mortgage which the defendants obtained for him had been really a prior lien. He holds Moore's purchase-money mortgage for \$4,000 in lien of that original mortgage. If the original mortgage had been a first lien, as the defendants undertook that it should be, then the purchase-money mortgage would now be a first lien. The plaintiff is damaged directly just so much as it falls short of being a first lien, and the measure of his damage was what it was necessary for him to pay to remove the prior incumbrances and make his mortgage first. He sought, in the first instance, to get a higher security than he has obtained. His failure to obtain it was due to the omission of his attorneys to discover the prior liens. The plaintiff's right of action accrued immediately, and he may recover the difference in value between the security that his attorneys actually obtained for him and that which they undertook to obtain under their contract of employment. (*Miller v. Wilson*, 24 Penn. St. 114; *Lawall v. Groman*, 37 Atl. Rep. 98.)

This does not mean the difference in ultimate value, to be determined by the amount which the plaintiff succeeds in collecting on his mortgage when he comes to foreclose it, but the test is the worth of the security when his attorneys obtained it for him compared to its worth at that time if there had been no liens ahead of it. As a guaranty that he would eventually recover the money loaned by him, the mortgage was lessened in value by the precise amount of the prior incumbrances, and the plaintiff suffered damage accordingly in the sum required to remove them and give him the first lien.

As to the items of expenditure made for the purpose of clearing the title, it appears that the first two payments were absolutely necessary, and these aggregate more than the amount which the plaintiff seeks to recover.

I think the plaintiff is entitled to judgment upon the submission.

All concurred.

Judgment for plaintiff upon agreed statement of facts, with costs.

ALFRED STROME, Respondent, v. LONDON ASSURANCE CORPORATION,
Appellant.

*Insurance—appraisal under the New York standard policy—duty of the umpire—
an award not set aside for mere inadequacy—inadequacy considered as bearing
upon the question of corruption or partiality—an insurer's offer of compromise is
inadmissible.*

The provisions of the New York standard fire insurance policy, to the effect that if the appraisers fail to agree they "shall submit their differences to the umpire," require the latter to examine and consider the estimate of the appraiser for each party in arriving at his determination, and where it appears that he acted in a hasty and perfunctory manner and listened only to the statement made by the insurer's appraiser, there is proof of legal misconduct upon his part sufficient to require a court of equity to set aside the award.

Inadequacy, pure and simple, in an appraisement under the New York standard fire insurance policy, is not a ground for setting it aside.

Quære, whether an award may not be so small as to indicate, when viewed in connection with other circumstances in the case, the existence of partiality or corruption.

Semble, that evidence of what an insurance company offered to pay to compromise a loss is inadmissible.

APPEAL by the defendant, the London Assurance Corporation, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 27th day of January, 1897, upon the decision of the court rendered after a trial at the Kings County Special Term.

Willard Parker Butler, for the appellant.

William M. Benedict, for the respondent.

WILLARD BARTLETT, J. :

This action was brought with a two-fold object: (1) To set aside an award or estimate made under the New York standard policy of fire insurance as to the amount of loss suffered by the plaintiff under such a policy issued to him by the defendant corporation; and (2) to recover the sum of \$430.56 which the plaintiff alleged to be his actual damage by reason of a fire against which the policy insured him. The plaintiff was successful in both aspects of the case. The trial court set aside the award or estimate of \$100 on the ground of its gross and palpable inadequacy, and also because of the mis-

conduct of the umpire, and gave the plaintiff a money judgment for the full amount which he claimed. Upon the present appeal the defendant insists that such an estimate or award cannot be set aside for mere inadequacy; that, even if it could be vacated for that reason, the learned trial judge received evidence on this branch of the case which was inadmissible, and that misconduct cannot be predicated upon the acts of the umpire of which the plaintiff complains.

The insured property which was destroyed by fire consisted chiefly of furniture, carpets, household goods and clothing. Being unable to agree upon the amount of the loss the parties appointed appraisers, Mr. Alfred L. Beatty being selected by the plaintiff, and Mr. Adolph Friedman by the defendant. The former estimated the plaintiff's total loss at \$440.22, while the latter made it only about \$80. In view of this disagreement the appraisers then chose Mr. Joseph Wechsler to act as umpire under the provisions of the policy. Mr. Wechsler, with Mr. Friedman, the defendant's appraiser, thereupon determined the amount of the loss to be \$100, the plaintiff's appraiser, Mr. Beatty, declining to sign the award.

The appraisalment and estimate under the New York standard policy of fire insurance is not the same proceeding as an arbitration and award at common law or under the Code. (*Fleming v. Phoenix Assurance Co.*, 75 Hun, 530; *Enright v. Montauk Ins. Co.*, 15 N. Y. Supp. 893.) Hence the decisions in cases of arbitration and award are not always applicable to the solution of questions arising under a fire insurance appraisalment. But even in arbitrations, strictly speaking, the courts do not exercise the power of annulling the determination simply because the amount awarded seems to be inadequate (*Masury v. Whiton*, 111 N. Y. 679); and we are of the opinion that no more stringent rule should be applied to insurance appraisalments, which are proceedings of a far less formal character. (*De Groot v. Fulton Fire Ins. Co.*, 4 Robt. 504.) We do not say that an estimate by the appraisers and umpire under an insurance policy might not be so small as to indicate partiality or corruption, when viewed in connection with other circumstances in the case; but, except as tending to establish misconduct, we think that inadequacy, pure and simple, cannot be considered as a ground for setting aside such an appraisalment.

If, therefore, the judgment below had no other basis it would lack sufficient support in the decision ; and even if mere inadequacy would suffice to avoid the award, the admission of evidence as to what the corporation offered to pay by way of compromise was error which would demand a reversal were there no separate and independent question of misconduct in the case. (*Smith v. Satterlee*, 130 N. Y. 677.) But there is such a question, which seems to be wholly separable from the other, and which appears to have been correctly decided in favor of the plaintiff.

We think the evidence may be regarded as establishing an utter refusal and neglect on the part of the umpire properly to perform his duties, and that his neglect and refusal amounted to misconduct in a legal sense, and require the court to withhold its sanction from an award made under such circumstances.

For the obligations undertaken by the appraisers and the umpire we must look to the language of the policy. It provides that, in the event of a disagreement as to the amount of loss, the same shall be ascertained by two competent and disinterested appraisers, the insured and the insurance company each selecting one, "and the two so chosen shall first select a competent and disinterested umpire ; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and failing to agree shall submit their differences to the umpire, and the award in writing of any two shall determine the amount of such loss."

The precise manner in which the appraisers were to proceed was not prescribed by the terms of the policy. As was said in *De Groot v. Fulton Fire Ins. Co.* (*supra*), they "were at liberty to arrive at a conclusion in regard to the value of the articles they were called upon to estimate in such way as they thought proper ; they were not bound to the strict judicial investigation of an arbitration." As to the umpire, however, the requirement of the policy that the appraisers in the event of their disagreement should submit their differences to him, carried with it the clearest implication of duty on his part to examine and consider the appraisalment of each in arriving at his own determination. But if the evidence in behalf of the plaintiff be true (and the trial court evidently believed it), Mr. Wechsler declined and omitted to do this. The umpire appears to have acted in a hasty and most perfunctory manner in performing

his functions under the policy. He went to the plaintiff's residence where the damaged goods were with the defendant's appraiser, Mr. Friedman, and was there half an hour before the plaintiff's appraiser, Mr. Beatty, arrived. He refused to go over the goods with Mr. Beatty, saying that he had already gone over them with Mr. Friedman. He would not even look at Mr. Beatty's list of the articles and the values put upon them. He said he did not have time and he scarcely listened to anything that Mr. Beatty said. Such was the account of Mr. Wechsler's conduct given by Mr. Beatty, and although Mr. Friedman described it differently, the trial judge was authorized to accept the statement of the plaintiff's appraiser. His testimony indicates quite clearly that the umpire reached a determination in favor of the defendant after hearing the defendant's side of the case only, and practically refusing to hear the appraiser for the plaintiff. A decision made in this manner cannot be allowed by a court of equity to stand.

In the opinion at Special Term reference is made to the fact that the umpire was not sworn, but the formal decision does not mention this as one of the grounds upon which the judgment was rendered, nor does the respondent's counsel in his brief cite any authority in support of the objection. It need not be passed upon, in view of our conclusion that the judgment can be and should be sustained by reason of the umpire's refusal and neglect properly to discharge his duties, irrespective of any other point discussed upon the trial or on this appeal.

All concurred.

Judgment affirmed, with costs.

MARGARET FENERAN, Respondent, v. THE SINGER MANUFACTURING COMPANY, Appellant.

Sale upon the installment plan — the vendor is not liable for an assault committed by its collector in attempting forcibly to remove a sewing machine for non-payment by the purchaser — a practical construction put upon a pleading by the parties.

A vendor of goods sold upon the installment plan, who employs a man to collect installments and expressly instructs him that he must not in any case touch or take the goods for the non-payment of an installment, is not liable for an assault upon the vendee committed by the collector, while attempting to retake the

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goods because of the non-payment of an installment, as such act is not within the scope of the collector's employment.

Semble, that even in the absence of such instructions no liability would exist in such a case on the part of the vendor.

A practical construction which both the parties to an action and the court put upon a pleading during the trial thereof should prevail upon an appeal.

APPEAL by the defendant, The Singer Manufacturing Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 20th day of January, 1897, upon the verdict of a jury, and also from an order entered in said clerk's office on the 20th day of January, 1897, denying the defendant's motion for a new trial made upon the minutes.

William H. Hamilton [*Rastus S. Ransom* with him on the brief], for the appellant.

Alfred E. Mudge [*Arthur C. Salmon* with him on the brief], for the respondent.

WILLARD BARTLETT, J. :

The plaintiff has recovered damages against the defendant to the amount of \$1,200 for an assault and battery committed upon her by one William H. Ross, in the city of Brooklyn on the 11th day of July, 1895. She had purchased a sewing machine from the defendant on the installment plan for which she was to pay sixty-five dollars in all. Ross was a collector and salesman in the defendant's employ. He called at the abode of the plaintiff to collect an installment of three dollars. Mrs. Feneran offered him two dollars, saying that was the best she could do to-day; Ross declined to accept the two dollars, and, declaring with an oath that he would have the machine, sprang into the bedroom where it was standing, seized it and began to drag it out. Mrs. Feneran attempted to detain the machine, whereupon Ross struck her, knocked her down and kicked her, inflicting injuries for which the verdict would be none too large if it were against him personally instead of against the Singer Manufacturing Company.

It does not seem to us, however, that the judgment can be maintained against the corporation. The basis of liability in such cases is clearly defined. The employer is not liable unless the wrongful act is done in the course of the employment. (*Meehan v. More*

wood, 52 Hun, 565 ; *affd.* on opinion at General Term, 126 N. Y. 667.) The proof was clear that the employee here had no authority to take away a machine for the non-payment of an installment or for any other reason. Ross had been a salesman, and when he began to work as a collector for the defendant he was expressly instructed that if he could not get a payment which he sought to collect, he must not in any case touch or take the machine. Even without this instruction in the negative, I do not think any authority to seize and carry away the machine could be implied from the mere employment of the assailant as a collector, and I have so held at Circuit. (*Marciano v. Singer Manufacturing Company*, Kings Co., Nov. 1894, unreported.)

In the cases to which I have referred I am committed to a view of the law which is fatal to the recovery in the present action unless the averments in the 2d paragraph of subdivision 2 of the answer may fairly be regarded as an admission that Ross acted with the authority of the defendant corporation in his efforts to take and carry away the machine. Upon the oral argument I was inclined to think that the answer might be thus construed ; but a careful examination of the record satisfies me that it was not so intended by the pleader, or so understood by the counsel for the plaintiff or by the court. The proof in behalf of the defendant and the discussions on the various motions show that it was the contention of the defendant throughout that Ross had no authority, general or otherwise, to retake the machine from a delinquent purchaser. Under these circumstances, the practical construction which both the parties and the court put upon the pleading during the trial should prevail with us here.

As the case stood when all the evidence was in, there was no proof sufficient to justify a finding by the jury that the servant in committing the assault was at the same time acting within the scope of the master's employment. The motion to direct a verdict for the defendant should, therefore, have been granted.

I think we ought to reverse the judgment and order a new trial.

All concurred.

Judgment and order reversed and new trial granted, costs to abide the event.

MARY B. TRAIN, Respondent, v. GEORGE L. DAVIDSON, Appellant.

A contract by a husband to furnish to his wife proof of his adultery, to enable her to procure a divorce, is unenforceable.

Where a contract made by a husband with his wife (subsequently divorced) to pay to her a certain sum semi-annually, appears to have been part of a larger agreement whereby the husband was to assist his wife to procure an absolute divorce from him by furnishing to her proof of his past adultery and thereby to enable her to marry another person, the contract cannot be enforced.

APPEAL by the defendant, George L. Davidson, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Westchester on the 15th day of February, 1897, upon the verdict of a jury rendered by direction of the court, and also from an order entered in said clerk's office on the 20th day of February, 1897, denying the defendant's motion for a new trial.

Ira Leo Bamberger, for the appellant.

Flamen B. Candler, for the respondent.

WILLARD BARTLETT, J. :

The parties to this action were formerly husband and wife. Their marriage was dissolved by a decree of divorce granted at the instance of the wife on the 30th day of November, 1894. By a written contract between them, dated on the 9th day of November, 1894, but which does not appear to have been delivered to the wife until sometime after the divorce, the husband agreed to pay \$2,000 a year to the wife in semi-annual installments of \$1,000 each, in consideration of a release of her dower and an undertaking on her part to save him harmless from any debts of her contracting, for necessities or otherwise, during her natural life. This contract further authorized and directed one John G. Jenkins, surviving executor of Abby E. Laytin, deceased, to pay over to the plaintiff or her assigns the said sum of \$2,000 a year, and to deduct the same from the moneys due and to grow due to the defendant from said estate.

The wife, who has married again, brings this action to recover

\$2,000 which she claims to be due under that agreement. The defendant sets up five defenses, but it is necessary to consider only one of these in order to dispose of the present appeal. In the second separate defense he avers in substance that his wife being desirous of marrying another man, an agreement was made between the parties in 1894 whereby the husband was to facilitate the wife in obtaining a divorce from him by committing adultery and by furnishing her with evidence of such adultery as well as with evidence of adultery previously committed by him, and was not to defend any action brought against him for divorce, and was to agree to pay the wife \$2,000 a year for life by assigning to her for that purpose a sufficient portion of a trust fund to which he was entitled, and whereby the wife undertook to institute such an action for divorce and procure a decree which should omit any provision for alimony, costs or counsel fee against the husband. In this defense it is furthermore alleged that the defendant did commit adultery and did furnish his wife with the evidence of his adultery, committed both prior and subsequent to the agreement, whereupon she brought suit against him which he did not defend, and she obtained her decree accordingly, omitting all provision for alimony, costs and counsel fee, and the agreement now sued upon is alleged to have been executed pursuant to the earlier and more comprehensive contract for the divorce proceedings. The defendant's position is that the contract in suit having been entered into in pursuance and as a part of the agreement for the divorce, is illegal and void in that the contract as an entirety is contrary to public policy.

On the trial the defendant did not undertake to prove this defense quite as fully as it is pleaded. His counsel avowed his readiness to prove everything therein contained, except the averment that the agreement provided that the husband was thereafter to commit adultery. With this modification, however, the contract still remained a contract whereby the husband agreed to help his wife to divorce herself from him by placing in her hands the necessary proof of adultery previously committed, without which, presumably, she could not succeed.

But the learned trial judge would not allow the defendant to show that his wife entered into any such agreement. The defendant took the stand as a witness in his own behalf, but was permitted

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to answer only a single interrogatory out of the scores of questions which were put to him. The following extract from the record, relating to the direct examination of the defendant, illustrates how the defense under consideration was treated upon the trial: "Q. Did she (your wife) then say to you, 'I don't want to live with you any longer, and if you will furnish me with evidence of your past adultery I will get a divorce and I will not make any claim for counsel fees, costs or alimony, provided you do not defend the action and facilitate me in getting the divorce quickly?' [Objected to by plaintiff as immaterial. Objection sustained. Defendant excepts.] Q. And what else did she say, if anything? [Objected to by plaintiff as immaterial. Objection sustained. Defendant excepts.] Q. Did she say to you at the same time that you could furnish her with evidence of any previous adultery that you had committed, and did you then say that you did not want to be put in that position, and did she then say that this would be the best thing for both of you to do, and the quicker it is done the better it will suit her? [Objected to by plaintiff as immaterial. Objection sustained. Defendant excepts.]"

Here the counsel for the defendant was laboriously endeavoring to prove the second separate defense set up in his answer, as modified by the statement already mentioned, that he would not undertake to show that the agreement contemplated acts of adultery yet to be committed. Although some of the questions were leading in form, they were plainly thus framed so as to make the purpose of counsel manifest to the court, and they were not objected to on that ground. The exclusion of the evidence sought by this line of inquiry can only be justified, it seems to me, if we are prepared to hold that the averments of the answer which that evidence would tend to establish do not constitute a defense.

The averments of the second defense, as limited by counsel's statement as to what he would attempt to prove thereunder, amounted to this, that the contract to pay the plaintiff \$2,000 a year, upon which the present suit is brought, was part and parcel of a larger contract made between the parties when they were still husband and wife, whereby, among other things, the husband undertook to furnish the wife with proof of past adultery on his own part, in order that she might divorce the defendant and wed another man whom she desired

to marry. Whether the defendant could have proved these averments is not the question. Should he not have been allowed to introduce evidence tending to prove them? I think he should; and that if they were established they would show a contract of such a character as to preclude a court of law from giving any effect to it, so far as it remains executory. Agreements between husband and wife for the purpose of procuring a divorce have often been condemned as contracts against public policy. (*Daggett v. Daggett*, 5 Paige, 508; *Whitney v. Whitney*, 4 App. Div. 597; *Hungerford v. Hungerford*, 16 id. 612, 614; *Goodwin v. Goodwin*, 4 Day [Conn.], 343; *Adams v. Adams*, 25 Minn. 72; *Cross v. Cross*, 58 N. H. 373; *Hardy v. Smith*, 136 Mass. 328.) The law favors the maintenance of peace and harmony between husband and wife, and the restoration of their relations when interrupted; so that while it approves the settlement of matrimonial controversies, it frowns upon agreements for the dissolution of marriage. (See *Adams v. Adams*, 91 N. Y. 381, 384.) But the agreement which the defendant attempted to prove was something more than a contract made simply for the purpose of enabling the wife to procure a divorce. It contemplated the divorce merely as a necessary step to the accomplishment of her desire to marry another man. There was not simply a purpose to get rid of a bad husband, but a purpose to procure one whom the wife already deemed better. Such is the fair construction of the language used by the pleader, and it will hardly be contended that the law should enforce a contract of this nature.

For the error of the trial court in refusing to receive the proof offered by the defendant in support of his second separate defense, the judgment should be reversed and a new trial granted, with costs to abide the event.

All concurred.

Judgment and order reversed and new trial granted, costs to abide the event.

LILLIAN F. NAYLOR, Respondent, v. CATHARINE COLVILLE and Others, Appellants.

Foreclosure—redemption by a junior incumbrancer, not made a party—redemption allowed without a resale—costs against purchasers who resist a redemption.

Where the holder of a duly recorded junior mortgage is not made a party to an action brought to foreclose a prior mortgage existing upon the same premises, the purchaser at such foreclosure sale occupies as to such junior mortgagee the position of a mortgagee in possession from whom the junior mortgagee is entitled to redeem.

In such a case the decree of redemption should permit such purchaser to retain the possession on paying to the junior mortgagee the amount due to him and he should not be compelled to submit to a sale.

The rule that a subsequent incumbrancer, seeking to redeem, must pay the costs of the suit, does not apply where the defendants improperly resist the assertion of the right of redemption.

APPEAL by the defendants, Catharine Colville and others, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 30th day of March, 1896, upon the decision of the court rendered after a trial at the Kings County Special Term.

Alfred Roe, for the appellants.

Oscar Frisbie, for the respondent.

WILLARD BARTLETT, J.:

The mortgage which the plaintiff sought to foreclose in this action was executed by one John McKernan to Edward K. Robbins on October 6, 1876, and recorded on February 27, 1877. On the day when it was recorded it was assigned by Edward K. Robbins to the plaintiff, but the assignment was not placed upon record until September 5, 1894. The defendants Colville have acquired possession of the mortgaged premises through the foreclosure of a prior mortgage thereon. This prior mortgage was dated August 28, 1873, and recorded on October 14, 1873. It subsequently passed by mesne assignments to the Sag Harbor Savings Bank, by which institution it was foreclosed. The complaint and notice of *lis pendens* in the foreclosure suit were filed in the office of the clerk of Kings county on June 9, 1877. Although the mortgage of John

McKernan to Edward K. Robbins (upon which the plaintiff now sues) had been recorded on February 27, 1877, as already stated, Robbins was not made a party defendant to the bank's suit. It seems plain, therefore, that neither his rights nor those of the plaintiff, who had succeeded to them as his assignee, could be affected by the foreclosure of the prior mortgage held by the Sag Harbor Savings Bank. Robbins was a junior incumbrancer whose lien had not been cut off, and the plaintiff stands in his shoes.

That foreclosure, the purchase of the premises at the foreclosure sale by the bank, and the subsequent sale to the defendants Colville, leaves these defendants in the position of mortgagees in possession, from whom the plaintiff herein, under her subsequent mortgage, is entitled to redeem. (*Salmon v. Allen*, 11 Hun, 29, 32.) As was held in the case cited, however, we think a decree of redemption should have been entered, which would permit the defendants to retain possession of the property if they elect to pay the amount due to the plaintiff instead of an interlocutory judgment compelling them to submit to a sale. There would seem to be no difficulty in modifying the judgment so as to effect this result. The facts found by the trial court are fully sufficient to sustain a decree of redemption. There are only two exceptions to the findings of fact, and neither is tenable, there being evidence in the record tending to establish each.

In a suit by a subsequent incumbrancer to redeem, it is the rule that the party redeeming shall pay the costs of the suit, unless the defendant improperly resists the assertion of the right of redemption. (*Belden v. Slade*, 26 Hun, 635, 642.) Here, however, the appellants utterly deny what seems to be a very plain right in the premises on the part of the plaintiff, and have thus deprived themselves of the benefit of this rule as to costs.

The interlocutory judgment should be modified so as to provide for a redemption by the plaintiff, according to the settled practice in equity, and, as thus modified, should be affirmed, without costs of this appeal.

All concurred.

Judgment modified, in accordance with the opinion of BARTLETT, J., and, as thus modified, affirmed, without costs.

PAUL HALPIN, Respondent, v. THE MUTUAL BREWING COMPANY and Others, Appellants; THOMAS D. COLEMAN and Others, Defendants.

Corporations — action by one trustee against the other trustees based upon their mismanagement of the corporation — a trustee need not formally accept his office — failure to attend meetings as a neglect of duty — acquiescence of all stockholders in fraudulent acts of trustees is not a defense — what acts on the part of the trustees are fraudulent.

An action to enforce the remedies for the mismanagement of a corporation, provided by sections 1781 and 1782 of the Code of Civil Procedure, may be maintained by a duly elected trustee and vice-president of the corporation, although he in no manner signified his acceptance of his election to the offices in question, acceptance in such cases being usually presumed.

The fact that the officer did not attend the meetings of the trustees for a period of about three months immediately following his election, does not constitute, as matter of law, such a long-continued neglect of duty as amounts to an abandonment of his office as trustee, nor does it justify his associates in declaring his office as trustee vacant.

The acquiescence of all the stockholders of a corporation in the acts of its directors, in so dealing with its assets as to deprive future creditors of the corporation of the payment of their just claims, will not avail as a defense to an action brought by an officer of the corporation under section 1781 of the Code of Civil Procedure.

A delinquent trustee is, however, entitled to credit for moneys which he has contributed to the funds of the corporation and for his payment of its obligations.

Where such a trustee has indorsed, and applied the proceeds of, certain fictitious notes signed by irresponsible persons (not representing any real indebtedness to the corporation, but procured by him to be discounted to its credit by a bank) to the payment of other notes upon which the corporation was liable, the corporation is not damaged by the transaction and the trustee should not be charged with the amount of such notes.

Where a corporation is either already insolvent, or is on the verge of insolvency, its trustees cannot allow one of its officers to acquire a preferential lien on the corporate assets by permitting him to obtain obligations of the corporation upon which he can readily procure judgment.

APPEAL by the defendants, The Mutual Brewing Company and others, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Queens on the 16th day of July, 1895, upon the decision of the court rendered after a trial at the Kings County Special Term.

The action was commenced June 21, 1893, and has been already reported in 91 Hun, 220.

John A. Dutton, for the appellants Coleman.

Frederick Eder, appellant, in person.

Benjamin Yates, for the plaintiff, respondent, and for the receiver of The Mutual Brewing Company, appellant.

WILLARD BARTLETT, J. :

The plaintiff brought this action as a trustee and the vice-president of the Mutual Brewing Company to enforce the remedies for the mismanagement of a corporation, which are provided for by sections 1781 and 1782 of the Code of Civil Procedure. (See *Gildersleeve v. Lester*, 68 Hun, 532 ; *Skinner v. Smith*, 134 N. Y. 240.) The only ground on which his right to sue is questioned is that he had ceased to be a trustee and officer at the time the action was commenced ; but we think the court below properly decided against the appellants on this point. There was no doubt that he had been lawfully chosen trustee and vice-president ; and the proceedings of the other trustees, whereby they assumed to declare his office vacant, were without warrant under the by-laws of the corporation, and were ineffectual for the purpose. He became a trustee and the vice-president of the corporation on February 10, 1892, at the only meeting of the trustees which he ever attended, and was re-elected to both offices on January 13, 1893. At the request of the appellants the learned trial judge has found that the plaintiff in no manner signified his acceptance of such election as director or vice-president of the said defendant company for the year 1893, and never attended any of the meetings of the said company during that year. On the 13th day of April, 1893, at an adjourned meeting of the trustees, a resolution was passed declaring vacant the office of trustee and vice-president held by the plaintiff. While the by-laws of the Mutual Brewing Company provided for the removal of a trustee, on due cause shown, by a majority vote of all the other trustees, this was authorized only when a written notice of such proposed removal had been given, and there had been no notice of an intention to remove the plaintiff. The appellants insist that the trustees did not attempt or assume to remove Mr. Halpin, but merely declared his office vacant, which was a very different thing, and a thing which they contend that the trustees had a right to do. The very authority which they cite on this point, how-

ever, declares the rule to be that, in the absence of an express declaration or any statute or controlling usage to the contrary, one elected a director is presumed to accept. (Spelling on Private Corporations, § 418.) The plaintiff, therefore, was deemed to have accepted the offices to which he had been chosen, even if he had not affirmatively indicated that fact; and it cannot be held, as a matter of law, that his omission to attend such meetings as there may have been between January and April constituted such a long-continued neglect of duty as amounted to an abandonment of his office as trustee, and warranted his associates in declaring it vacant and thus virtually removing him without the notice prescribed by the by-laws.

The litigation relates chiefly to the alleged mismanagement of the business and affairs of the Mutual Brewing Company by three of its directors, Matthew Coleman, Michael T. Coleman and Frederick Eder. Matthew Coleman, on account of his misappropriation and misapplication of moneys of the corporation, is directed by the judgment to pay \$56,986.56 to the receiver of the Mutual Brewing Company, and by reason of their action in permitting such misappropriation and misapplication on the part of Matthew Coleman, his fellow trustees, Michael T. Coleman and Frederick Eder, have been adjudged to pay to the receiver the sum of \$23,949.27 each. The judgment also sets aside a chattel and real estate mortgage, known as the Dobbler mortgage, to the extent of \$27,000, which would have been payable to Michael T. Coleman, as the assignee thereof, if its validity had been wholly maintained. The decree furthermore vacates two judgments obtained by Denis Coleman against the Mutual Brewing Company upon notes for \$19,300 and \$6,000 respectively, and adjudges the notes to be void as well as an agreement under which the larger note was given.

The record is a long one, and presents a case so complicated in its facts and figures that the reargument which we felt obliged to order was essential to a satisfactory disposition of the appeal, especially as we have not had the benefit of an opinion at Special Term, which would have been peculiarly valuable and helpful in a litigation of this character.

In behalf of the appellant Michael T. Coleman, it is said the evidence shows that all the acts committed by him were done with the consent and acquiescence or subsequent ratification of all the stock-

holders of the Mutual Brewing Company, and hence that they could not properly be made the basis of any judgment against him. The proposition is that these transactions thus became valid and binding upon the corporation inasmuch as they were neither *mala in se* nor *mala prohibita*, and no rights of creditors intervened. Hence it is argued that they cannot be assailed in the manner now attempted. Unfortunately for this view of the case, however, the trial court has found that they "were all a part of a fraudulent scheme of the defendants Matthew Coleman, Frederick Eder, Michael T. Coleman and Denis Coleman to obtain control of the property and assets of the Mutual Brewing Company, and appropriate the same to their own use in fraud of the stockholders and creditors;" and this finding is justified by the evidence. There appear clearly to have been creditors in 1892 and 1893 whose interests were injuriously affected. The case, therefore, does not fall within the rule as stated by the learned counsel for the appellants and invoked in their behalf. It is true that the fraudulent scheme of depleting the property of the corporation seems to have been put into operation before the claims of these creditors accrued, but that does not make any difference. The acquiescence of all the stockholders of a corporation in the action of the directors in dealing with its assets for the purpose of depriving future creditors of payment for their just claims, will not avail as a defense to a suit brought by an officer under section 1781 of the Code of Civil Procedure. Nor do any of the cases cited for the appellants carry the doctrine of acquiescence so far. In *Kent v. Quicksilver Mining Co.* (78 N. Y. 159) there was no suggestion of any injury to creditors. In *Skinner v. Smith* (134 N. Y. 240) it is expressly declared that creditors were not injured by the acts complained of. In *Martin v. Niagara Falls, etc., Co.* (122 N. Y. 165) the ratification was upheld because, among other things, there were "no rights of creditors intervening." And in *Little v. Garabrant* (90 Hun, 404) PARKER, J., says: "The question that we are considering assumes that the rights of creditors and of third parties do not intervene."

The proof is ample to support the conclusion of the learned trial judge that Matthew Coleman had unlawfully acquired property of the Mutual Brewing Company to the amount of \$56,986.56. It would follow that the judgment was correct in requiring him to pay

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that sum, were it not for two items of credit which appear to have been overlooked. Matthew Coleman testified, without contradiction, that he contributed in cash \$28,000 to the funds of the corporation, and paid obligations amounting to \$12,000, making \$40,000 in all. These statements are really not disputed, but, in answer to the claim that here is a contribution of \$40,000 for which Matthew Coleman is certainly entitled to credit, the respondent says that no attempt was made to charge him with anything like all the property of the Mutual Brewing Company which he had in fact appropriated, and that the \$40,000 would be more than offset if Matthew Coleman had been charged in the judgment with the full amount chargeable against him under the proof. We must regard the findings on this part of the case, however, as conclusive upon the respondent, and cannot hold that the amount of money misappropriated by Matthew Coleman exceeded the sum found by the trial court. On the other hand, he, as an appellant, is at liberty to show that it is too large, and we think he has done so to the extent of \$40,000. This amount must, therefore, be deducted.

There is another item of credit to which he claims to be entitled, in respect to which the facts are not so clear. This is a charge of \$10,800, included in the money judgment against him, found by the court to be the amount of certain fictitious notes (*i. e.*, notes signed by irresponsible persons who owed the brewing company nothing), indorsed by Matthew Coleman and discounted by the West Side Bank, upon which the bank has since recovered judgments against the Mutual Brewing Company. In the brief for the appellants submitted upon the reargument, it is insisted that the corporation received full value for this paper, which was regularly discounted, and that the money went to pay other notes upon which the Mutual Brewing Company was liable, so that its indebtedness to the bank was not increased by the transaction. By procuring the bank to discount the fictitious notes, as they are called, the brewing company simply obtained a loan which it became obligated to pay, and Matthew Coleman, who conducted the transaction, inflicted no injury upon the brewing company, provided he applied the proceeds of that loan to the payment of honest obligations of the corporation. What he did, as we understand the findings, was this: The brewing company had procured other notes of its customers to be discounted

at the bank to the aggregate amount of \$6,741.66. He took up these notes and returned them to the makers in exchange for renewal notes, thus canceling an obligation of \$6,741.66 to the bank. The renewal notes, with some others belonging to the Mutual Brewing Company, the whole representing the sum of \$8,666.46, Matthew Coleman took into his own possession; and he caused to be entered upon the books of the brewing company a statement that they had been transferred to Denis Coleman as collateral security for certain alleged loans by him to the company aggregating \$3,375. The trial judge found that these loans were not made at the times or in the manner claimed, and that Denis Coleman did not receive the renewal notes as collateral security for any loans made by him. The judgment directs him and Matthew Coleman to deliver said notes to the receiver.

There is no proof as to what was done with the balance of the proceeds of the fictitious notes over and above the \$6,741.66, applied for the purpose of taking up the customers' notes on discount in the West Side Bank. We cannot assume that it was improperly used, in the absence of evidence to that effect. The only theory upon which it can be held that the Mutual Brewing Company was damaged by the transaction, so far as it is disclosed by the record, is that the renewal notes transferred to Denis Coleman are obligations upon which the company remains liable by reason of having indorsed them over to the present holder as collateral security for a debt. But this liability is guarded against by the adjudication that Denis Coleman is not entitled to them as security or otherwise, and by the direction in the judgment that they be delivered up. It seems to us, as to this branch of the case, that the Mutual Brewing Company is not shown to have suffered by what Matthew Coleman did with respect to the so-called fictitious notes, and that the money judgment against him is too large by the sum of \$10,800, which they represent.

Deducting from \$56,986.56 the two items of \$40,000 and \$10,800, which have been discussed, and we have \$6,186.56 as the amount to which the money judgment against Matthew Coleman must be reduced.

As has already been stated, the defendants Michael T. Coleman and Frederick Eder have been held liable for permitting Matthew Coleman to misapply and misappropriate the property of the Mutual

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Brewing Company while they were trustees of that corporation. The findings show how the amount of their liability has been arrived at. In the 44th conclusion of law the court finds that Michael T. Coleman and Frederick Eder are indebted to the Mutual Brewing Company in the sum of \$50,947.27, representing the total amount which they wrongfully and unlawfully allowed the said brewing company to pay to the New York County National Bank and the West Side Bank, and the debts of the New York and College Point Ferry Company and the Coleman Brewing Company, and a bill for beer sold, which they likewise allowed to be charged personally against Matthew Coleman. From this aggregate is deducted \$27,000 on account of the invalid portion of the Dobbler mortgage, already mentioned. This leaves \$23,947.27 chargeable against each of these defendants, Michael T. Coleman and Frederick Eder. But it would seem that two of the items referred to in the 44th conclusion of law represent misappropriations which occurred when Mr. Eder was not a trustee. The debt from the Coleman Brewing Company, \$7,944.47, and the bill for beer, \$8,819.48, were transferred to Matthew Coleman's personal account on April 30, 1890, six days after Mr. Eder had resigned from the board. He was not re-elected until January 14, 1891. Therefore, even if the money judgment against Matthew Coleman were to remain at the amount fixed by the trial court, the defendant Eder would be entitled to have the money judgment against himself reduced by deducting therefrom the sum of the two items which have been mentioned. This would leave a money judgment of \$7,183.32 as against him, and \$23,947.27 against Michael T. Coleman.

Both these judgments, however, must be still further reduced in proportion to the reduction of the money judgment against Matthew Coleman from \$56,986.56 to \$6,186.56; that is, to about one-ninth of the amount in each instance.

But we see no reason to doubt the correctness of that part of the decree which declares the notes given to the defendant Eder were invalid. Whatever claim he may have had against the Mutual Brewing Company, the trial court was amply justified in holding that these notes were not enforceable against the corporation, in view of the manifest purpose for which they were given and the use to which they were put. It was the case of an officer of a corporation, either already insolvent or on the verge of insolvency, seeking to

acquire a preferential lien on the corporate assets by obtaining obligations upon which he could readily procure judgment. (*Throop v. Hatch Lithographic Co.*, 125 N. Y. 530.)

The appeal of Denis Coleman remains to be considered.

On March 25, 1893, an agreement was made between Denis Coleman and Matthew Coleman, as president of the Mutual Brewing Company, for the sale and transfer by the former to the corporation of certain hogsheads, trucks and harness for the sum of \$19,300. The property which the brewing company received under this contract was not reasonably worth more than \$5,175. The trial court, upon sufficient evidence, has adjudged the contract void, as constituting part of a fraudulent scheme by Matthew Coleman, Michael T. Coleman and Frederick Eder to appropriate the property of the company to their own use. It has also adjudged void the note given in pursuance of the contract, and has directed the cancellation of the judgment thereon. The point is made that the validity of the agreement could not be denied upon the trial of this action, or, at all events, that the judgment goes too far, inasmuch as the Mutual Brewing Company has retained a considerable part of the property, and has neither offered to restore it nor been directed to do so by the decree. The proper course in equity, in cases where the plaintiff seeks the rescission of a contract under which he has received property, is to offer in the complaint to restore it to the defendant; but such an offer is not indispensable. The court, in its decree, may provide for restitution as a condition of granting the desired relief. (See *Kley v. Healy*, 149 N. Y. 346, 352.) The decree herein should have directed the Mutual Brewing Company to return to Denis Coleman the hogsheads, harness and trucks received from him under the contract of March 25, 1893, or should have permitted his note and the judgment thereon to stand for \$5,175, the maximum value of said property, as found by the trial court.

The judgment appealed from should be modified in accordance with the views expressed in this opinion, and as so modified should be affirmed, without costs of the appeal.

All concurred.

Judgment modified in accordance with the opinion of BARTLETT, J., and as so modified affirmed, without costs of the appeal to any party.

PATRICK CASS, Respondent, v. THE THIRD AVENUE RAILROAD
COMPANY, Appellant.

Negligence—duty of a gripman on a cable car when approaching a crossing—opinions of physicians as to the permanency of injuries—statement by the party injured that he has since been unable to work—contributory negligence of a driver imputed to one riding with him—charge that a person was not negligent in attempting to cross in front of a car—questions directed to the credibility of a witness.

Negligence may be ascribed to a gripman who runs his cable car at such a speed, in approaching a cross street, that he cannot avoid colliding with a vehicle coming along the cross street and plainly visible 100 feet away; or who does not stop his car within that distance and avert the collision, when his car is moving moderately.

After an attending physician has described to the jury injuries caused by an accident he may, in answer to a question whether "these injuries" were permanent in their nature or not, state that the man was permanently injured.

A statement by the injured person that he had not done any work since the accident because he had not been able to do any, is not objectionable as a conclusion of the witness; it is only another form of saying that his physical disability was such as to prevent him from working.

Where the driver of a wagon and an injured person are engaged in a common enterprise, contributory negligence on the part of the driver is imputable to the person injured.

A charge of the court, in substance, instructing the jury that it was not negligence to attempt to cross in front of a car more than fifty feet distant, provided the car was capable of being stopped within fifteen or twenty-five feet, is improper, as that question is one to be decided by the jury only.

Such error is not cured by the fact that the court subsequently adds: "But, of course, as I have said, the jury deal with the question of the plaintiff's negligence as well as that of the gripman's negligence in the light of all of the surrounding circumstances connected with this case, and as they shall find them from the testimony in the case."

Semble, that with a view to testing his credibility as a witness, a policeman may be asked on cross-examination whether he ever made arrests for reckless driving, whether it was not his duty so to do, and whether it was not his duty to arrest a gripman if he saw him driving his car recklessly and running into people.

APPEAL by the defendant, The Third Avenue Railroad Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Queens on the 10th day of February, 1897, upon the verdict of a jury, and also

from an order entered in said clerk's office on the 5th day of March, 1897, denying the defendant's motion for a new trial.

Nathan Ottinger [*Henry L. Scheuerman* and *Albert H. Walker* with him on the brief], for the appellant.

Joseph Kohler, for the respondent.

WILLARD BARTLETT, J. :

The plaintiff in this action was thrown out of a wagon by a collision with a cable car of the defendant at Third avenue and Forty-seventh street, in the city of New York, and sustained injuries for which a jury has awarded him damages in the sum of \$10,000.

The verdict was not against the evidence. There was ample proof from which to infer negligence on the part of the gripman in charge of the defendant's car, and upon which to base a finding that the plaintiff and the driver of the wagon in which he was riding were both free from contributory negligence. The collision occurred at a cross street where vehicles were to be looked for. There was testimony tending to show that when the wagon was on the track the car was 100 feet distant. It would seem that negligence may well be ascribed to a gripman who runs his car at such a speed in approaching a cross street that he cannot avoid colliding with a vehicle coming along the cross street and plainly visible 100 feet off; or who does not stop his car within that distance and avert the collision if the car is moving more moderately. Under the circumstances, as they appeared to the plaintiff and the driver of the wagon, the attempt to cross the track before the car reached them involved no obvious risk, and they were properly absolved from any fault tending to bring the accident upon themselves.

A policeman who was called as a witness in behalf of the plaintiff was asked, on cross-examination, whether he ever made arrests for reckless driving, and whether it was not his duty so to do, and whether it was not his duty as an officer to arrest a gripman if he saw him driving his car recklessly and running into people. The court sustained the plaintiff's objection to these questions on the ground that the evidence called for was immaterial. The inquiries had some bearing on the credibility of the witness and might well have been allowed; but the limits of cross-examination are so largely discretionary, and the ruling was so manifestly harmless to the

defendant, when the entire testimony of this witness is considered, that the error affords no ground for reversal.

Another exception relates to the testimony of Dr. John Francis Burns in respect to the permanency of the plaintiff's injuries. This witness had been the plaintiff's physician and possessed actual personal knowledge of the injuries which the plaintiff had sustained. After he had described them to the jury, Dr. Burns was asked whether the injuries which he had specified were or were not permanent in their nature. Objection was made, and after some discussion between court, counsel and witness, the question was put in this form: "From your knowledge of these injuries and with your experience in the treatment of them, and also with your knowledge of the results up to this time, can you state with reasonable certainty whether these injuries are permanent in their nature or not? And, if so, are they permanent or not?" The witness answered that the man was permanently injured. The appellant criticises the question because it does not show what facts were the basis of the opinion thus expressed. When we consider the first question, however, and its limitation to the injuries which the witness had already specified within the hearing of the jury, it is evident that the same limitation was intended and understood to apply to the question in its final form, and that "these injuries" meant those which Dr. Burns had previously described. It was not necessary that they should all be specified again, as would have been required in the case of a hypothetical question to an expert who had no personal knowledge of the physical condition of the patient. (*Clegg v. Metropolitan Street Railway Co.*, 1 App. Div. 207.)

Another witness as to the character of the plaintiff's injuries was Dr. George D. Farwell, who, in response to a hypothetical question, expressed the opinion that they were permanent. The principal objection to this question on behalf of the appellant is that it omitted any mention of the improvement in some of the functions of the arm to which Dr. Burns had testified. This might have been a material fact, which ought to have been one of the assumptions in the hypothetical question, if Dr. Burns had said nothing further, but he had added that there had been very little improvement in the gross use of the arm since July, 1896, which was only about two

weeks after the accident. In view of this qualification of what he had previously said about functional improvement, it can hardly be held that the hypothetical question to Dr. Farwell should have been disallowed because it involved the suppression of a material matter beneficial to the appellant. Whatever improvement there may have been, it could scarcely affect the permanency of the injury if the improvement did not extend to the gross use of the arm, and the hypothetical question related solely to the permanency of the injury.

The statement of the plaintiff that he had not done any work since the accident, because he had not been able to do any, is criticised as a conclusion to which he should not have been allowed to testify. It was merely another form of saying that his physical disability was such as to prevent him from working. Testimony to this effect is constantly received in this class of cases, just as injured persons are allowed to give evidence in regard to the pain they suffer and its effects.

The evidence of the driver of the wagon as to his observation of the distance in which a Third avenue cable car could be stopped was relevant upon the question of his own prudence in driving as he did on the occasion of the accident. It tended to show that he had every reason to suppose that the approaching car could and would allow his wagon to cross in safety. The case was tried upon the assumption that the driver and the plaintiff were engaged in a common enterprise, so that any contributory negligence on the part of the driver was imputable to the plaintiff, and this view of their relation to one another appears to have been correct. (*Schron v. Staten Island Electric R. R. Co.*, 16 App. Div. 111.) They were occupied together in moving church furniture, and used the wagon for the purpose.

But there remains to be examined an important exception to the judge's charge.

The counsel for the plaintiff requested the court to charge the jury, "that if they believe the testimony of the conductor that the car was north of the north crossing and the driver nearer the south crossing, a distance of more than fifty feet, and that the car could be stopped in a distance of between fifteen and twenty-five feet; if they believe the gripman's statement as to that, that, therefore, the driver

was not negligent in attempting to cross the track, if they believe these statements."

In response to this request the court said: "I will charge it with this qualification, that it is not negligence in attempting to cross in front of the car, if the jury find those facts from the testimony in the case," to which instruction the counsel for the defendant duly excepted.

In the request there were two erroneous assumptions as to what had been sworn to by the witnesses for the defendant. The conductor did not testify that there was a distance of fifty feet between the car and the driver of the wagon. He said that the car was between fifteen and eighteen feet away when the horse's head was nearing the track. Nor did the gripman state that the car could be stopped in a space of fifteen to twenty-five feet. What he did say was that he could stop the car at the place of the collision, going at the speed he was then running, in twenty-five or thirty feet.

But these mistakes in regard to the evidence were not adopted in the instruction given by the court in response to the request. That instruction modified to some extent the proposition which the request contained. It did not restrict the attention of the jury to the evidence of the gripman and conductor alone, but referred to all the testimony in the case. Nevertheless, it told them that it was not negligence to attempt to cross in front of a car more than fifty feet distant, if the car was capable of being stopped in a space of between fifteen and twenty-five feet. If the learned judge had said that it was not necessarily negligent, or, in other words, that such an attempt was not negligence as matter of law, he would have been quite correct. (*Wells v. Brooklyn City R. R. Co.*, 58 Hun, 389.) But his language could have conveyed only one meaning to the minds of the jurors, and that was that the plaintiff and the driver of the wagon acted prudently as matter of fact in driving upon the track if the car was more than fifty feet off and could have been stopped in from fifteen to twenty-five feet. It seems clear that this was a question for the jury to determine without any direction from the court. Whether an attempt to cross a track under such conditions was the exercise of due care or not, might depend upon many other facts not mentioned in the request, and I see no way of avoiding reversal for this error.

It does not seem to me that it was cured by the remarks which were made by the learned trial judge just after the plaintiff's counsel took his exception, when the court added: "But of course as I have said, the jury deal with the question of the plaintiff's negligence as well as that of the gripman's negligence in the light of all of the surrounding circumstances connected with this case, and as they shall find them from the testimony in the case." Although the jury were thus told in substance that, in passing upon the question of contributory negligence they must take all the circumstances into consideration which they deemed established by the proof, this instruction must have been understood by the jury to be subject to the qualification previously stated by the court, to the effect that it was not negligence for the plaintiff to act in the manner specified, whereas the jury should have been left free to determine as matter of fact whether it was or not.

I think this error is so serious as to demand the reversal of the judgment.

All concurred.

Judgment and order reversed and new trial granted, costs to abide the event.

THE EMIGRANT MISSION COMMITTEE OF THE GERMAN EVANGELICAL LUTHERAN SYNOD OF MISSOURI, OHIO, AND OTHER STATES, AT THE CITY OF NEW YORK, Respondent, v. THE BROOKLYN ELEVATED RAILROAD COMPANY, Appellant.

Elevated railroads—basis for injunctive relief—damages to easements from ashes and cinders which fly from a dumping ground into the windows of a house are recoverable as past or rental and not as fee damages.

Where an elevated railroad is constructed upon a public street, an abutting owner is only entitled to relief by injunction for the invasion of his easements of light, air and access to the premises from the street.

Injury resulting from the fact that the elevated railroad owns land adjoining the premises in question on both sides and in the rear, and although given no specific legislative authority to do so, locates its yard and dumping ground thereon, from which ashes and cinders fly into the abutting owner's windows when they are opened, is allowable as past or rental damages only, but not as fee damage.

APPEAL by the defendant, The Brooklyn Elevated Railroad Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 16th day of December, 1896, upon the decision of the court rendered after a trial at the Kings County Special Term.

R. Percy Chittenden, for the appellant.

Stephen M. Hoyer, for the respondent.

BRADLEY, J. :

The purpose of the action was to restrain the defendant from operating its elevated railroad in Broadway, in front of the plaintiff's premises, and to recover damages. The plaintiff's premises are situated on the northerly side of that street, have a frontage on the street of 50 feet and a depth of 264 feet. The property was purchased in 1863 by one Birkner, who in 1869 erected a two-story mansard-roof house on it 40x40 feet, with an extension added, and the lot was otherwise improved.

The defendant's elevated railroad was constructed in Broadway, and the operation of it commenced in front of the property in June, 1885. In that month Birkner conveyed the property to Jacob Morch, who took the conveyance for the benefit of the plaintiff, and afterwards, in the year 1890, conveyed it to the plaintiff, and later made to the plaintiff an assignment, etc. The situation presented by the defendant's railroad is that there are four tracks, resting on posts, in front of the plaintiff's premises, and tracks extending along the easterly and westerly sides of the plaintiff's premises from the main tracks on Broadway. In fact the defendant occupies and uses as a yard lands on the easterly, northerly and westerly sides of, and adjacent to, the plaintiff's property, in which yard are tracks, shops, etc., for the purposes incidental to the operation of such a railroad, and it is the only yard the company has for such purposes. On the easterly side of the plaintiff's premises the defendant's engines are run in to dump ashes and cinders, and on the westerly side are the defendant's coal dumps. It is evident that not only the elevated road in front of the premises but the dumping of ashes and coal on the easterly and westerly sides of them render the property less desirable for occupation as a dwelling place. From what occurred

at the trial it may be assumed that the effect which the evidence tended to prove resulted from the dumping of ashes and cinders before referred to, was the subject of consideration there, since the motion, made by the defendant's counsel at the close of the evidence, that the court either strike out or disregard the evidence relating to the dropping of ashes and cinders near the property, inasmuch as they were dropped upon the ground of the defendant, was denied by the court. This motion was supplemental to exception taken on the trial to the same effect.

It appears that the defendant's railroad was constructed and operated in Broadway pursuant to legislative and municipal authority. In such a case, and to the extent of the grant of authority, the defendant did not become liable for merely consequential damages unless they were occasioned by its misconduct or negligence. (*Atwater v. Trustees, etc.*, 124 N. Y. 602; *Fobes v. R., W. & O. R. R. Co.*, 121 id. 505; *Talbot v. N. Y. & H. R. R. Co.*, 151 id. 155.) Whatever may have been the view on the subject before the *Story Case* (90 N. Y. 122), since then the interference with the beneficial enjoyment of light, air and access of an abutting owner on a street by the occupants in the use of it has been deemed the invasion of his property, although he have no property right in the street other than in such easement; and the struggle made in *Lahr v. Metropolitan E. R. Co.* (104 N. Y. 268) to obtain from the judgment of the court a particular limitation of that doctrine was ineffectual. The right to injunctive relief of the character of that sought in this action rests upon the invasion of the property of the plaintiff. (*Kane v. N. Y. E. R. R. Co.*, 125 N. Y. 164; *American Bank Note Co. v. N. Y. E. R. R. Co.*, 129 id. 252.) And so far as relates to the easements of light, air and access appurtenant to the premises in question, the plaintiff is entitled to recover such damages as have resulted from the occupation of the street in front of such premises. Such damages which go to depreciate the value of the property give support to injunctive relief.

But when we come to consider the manner in which the defendant's premises adjacent to those of the plaintiff were used and the effect of such use upon the enjoyment of the latter, a different question arises. The defendant had the right, as essentially inci-

dental to the operation of its railroad, to acquire land for the accommodation of its business. It must have a place to deposit its coal for fuel, for discharging ashes and cinders, for shops, for storage of cars, etc. The defendant, however, had no specific legislative grant to locate its yard at that place; and the question may arise whether the right to do what the defendant did in that respect came within the power implied from that expressly conferred. That may be dependent upon the further question whether it was reasonably exercised with a view to the rights of others. The question arose in *Cogswell v. N. Y., N. H. & H. R. R. Co.* (103 N. Y. 10), where the company located an engine house so near the premises of Cogswell that smoke, soot, cinders and coal dust came from it into his house. In delivering the opinion of the court, Judge ANDREWS said that "the statutory sanction which will justify an injury to private property must be express, or must be given by clear and unquestionable implication from the powers expressly conferred, so that it can fairly be said that the Legislature contemplated the doing of the very act which occasioned the injury." This principle and case have been recognized and adopted by other cases. (*Bohan v. P. J. G. L. Co.*, 122 N. Y. 18; *Morton v. The Mayor, etc., of New York*, 140 id. 207; *Spring v. D., L. & W. R. R. Co.*, 88 Hun, 385.)

On the part of the plaintiff, evidence was given to the effect that ashes and cinders, when dumped from the ashpan of the engines, flew into the house when the windows were open, rendering the occupation of the premises uncomfortable. The application of the doctrine of the *Cogswell* case and kindred cases permitted such a view of the use made of the adjacent premises by the defendant in the dumping of ashes and cinders where, and as they were discharged from the ashpans of the engines, as might enable the court to take that into consideration as an element of damage. But this could be treated as past damage only. It could not properly be included in the fee damages. (*American Bank Note Co. v. N. Y. E. R. R. Co.*, 129 N. Y. 262, 269; *Bischoff v. N. Y. E. R. R. Co.*, 138 id. 257, 262.)

It is only the invasion by the defendant of the plaintiff's easements of light, air and access as an abutting owner on the street, and damage resulting therefrom, which permit injunctive relief.

When the equitable jurisdiction is supported, the court, as incidental to the main relief, may assess and award past damages. (*Lynch v. M. E. R. Co.*, 129 N. Y. 274; *McGean v. M. E. R. Co.*, 133 id. 9; *Hunter v. M. R. Co.*, 141 id. 281.)

It cannot be ascertained, from the findings of the court, whether anything was allowed by way of damages for the infliction of injury upon the plaintiff's premises by the ashes and cinders blown upon them from the defendant's dumping place on the adjacent land; or, if allowed, whether it was not included in the past or rental damages only. Nor could this be shown by the decision of the court, because it does not appear that this element of damage was a factor in the evidence on the subject, otherwise than inferentially from the fact that such condition existed.

The learned counsel for the defendant did not, upon the trial, raise the question relating to the ashes and cinders founded upon the distinction hereinbefore mentioned as between the fee and past damages, for the reason, perhaps, that it made no difference to his client in which class of damages it was included, if any damages should be awarded for that cause of injury. But the objection was taken, from time to time, on the trial, that no damage was allowable for the consequence to the plaintiff's premises resulting from the dumping of ashes and cinders by the defendant on its own land, and, therefore, exception was taken to the reception of any evidence tending to prove such dumping of ashes and cinders, and the consequences to the plaintiff's premises.

If we are correct in the view taken, there was no error in the reception of the evidence, nor in the refusal of the court to strike it out or disregard it.

Some other exceptions were taken to evidence received, but there was no error to the prejudice of the defendant in any of the rulings of the court in that respect.

Much attention is given in the argument of the defendant's counsel to the asserted proposition that the damages awarded by the judgment are excessive, and this question is discussed by him with much force and ability. There is a marked conflict in the evidence introduced in behalf of the respective parties on this subject. The sum allowed for rental damages is fully up to the amount which the evidence permitted; but the amount allowed for the perma-

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ment, or fee, damages is between, and some ways from, the two extremes of the conflicting evidence.

It is deemed unnecessary to expressly refer here to the evidence in detail. From a careful examination of the evidence it appears that there was a question of fact presented by it upon which the court was warranted in assessing, and did assess, the amounts of both classes of damages, and, in the view which the trial court was permitted to take of the evidence, it is not seen that the conclusion there reached was against the weight of it.

The judgment should be affirmed.

All concurred, except CULLEN, J., not sitting.

Judgment affirmed, with costs.

THOMAS McKEON, Appellant, v. THE STEINWAY RAILWAY COMPANY,
Respondent.

Negligence — contributory negligence is not a defense where it is a remote and subsequent, and not the proximate and concurrent cause of an accident.

Contributory negligence, to be made available as a defense to an action brought to recover damages for personal injuries, must have been the proximate and concurrent cause of the accident.

A street railway corporation is not relieved from liability for the negligent failure of one of its servants to stop a car in time to avoid striking a man, who has been thrown from a wagon drawn by a runaway horse, and is lying unconscious upon the track, by the fact that the runaway was the result of a collision which occurred, because of the injured man's negligence, between the wagon and another of the defendant's cars which passed upon the same track a few moments previously.

APPEAL by the plaintiff, Thomas McKeon, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Queens on the 23d day of January, 1897, upon the verdict of a jury, and also from an order, bearing date the 29th day of October, 1896, and entered in said clerk's office, denying the plaintiff's motion for a new trial made upon the minutes.

Thomas F. Magner, for the appellant.

Eugene L. Bushe, for the respondent.

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BRADLEY, J. :

The alleged cause of action is for a personal injury suffered by the plaintiff through the negligence of the defendant. The trial resulted in a verdict for the defendant. The questions for consideration arise upon exceptions taken by the plaintiff's counsel to rulings at the trial, and more especially to the charge made by the court to the jury. The facts which the evidence on the part of plaintiff tended to prove were that in the evening of December 16, 1895, he drove his horse and truck up to the gateway of his employers' premises on Locust street, in the village of Corona, county of Queens, and that finding the gate locked he, with a view of departing, so backed up his horse into the street that the hind end of his truck-wagon projected over the eastern-bound track of the defendant's trolley railroad in that street; that he then saw an approaching car on that track and he proceeded to get upon the wagon to drive away; that before he was able to do so the car collided with the rear end of the wagon; that this caused the horse to run away, and that the plaintiff was thrown from the wagon, when upwards of 200 feet from the place of collision, and fell upon the same track; that he was then unconscious, and was injured by another car of the defendant going in the same direction a few minutes later; that two young daughters of the plaintiff, seeing the condition of the horse and wagon, looked for and discovered the plaintiff on the track; that one of them, while making an ineffectual effort to pull him from the track, saw the approaching car; that both of them screamed; that their screams were heard by the motorman and some others on the car, which did not stop until after it had struck the plaintiff and had passed the place where he was lying. The headlight of the car enabled the motorman to see twenty-five feet ahead of it, and his evidence was that he saw the plaintiff as the car approached, and that no part of his body was on the track, but that he lay wholly outside of and between the tracks, and that consequently the car could not, and did not, hit him at all.

The question whether the collision with the wagon was chargeable solely to the negligence of the defendant or attributable to any contributory negligence of the plaintiff was submitted to the jury, and the court charged them to the effect that, if any negligence of the plaintiff contributed to that collision, what followed was in like

manner affected by such negligence, and he could not recover for his injury suffered by the car running upon him when he was lying upon the track, if he received injury in that manner.

In other words, the view of the court was that if the contact of the car with the wagon, which caused the horse to run away, was imputable to any contributory negligence of the plaintiff, the defendant was entitled to a verdict, although the latter accident otherwise might be attributable solely to the negligence of the defendant. It may, in view of the finding of the jury, be assumed that the negligence of the plaintiff placed him in the position where he is said to have been struck by the other car, and that, therefore, the injury there received by him was in some sense the consequence of his negligence. But it does not follow that this gave legal immunity to the defendant to run its car on to him. The negligence of a plaintiff which is effectual to relieve a defendant from liability for the consequences of his negligence, must be proximate in such sense as to contribute concurrently to the result complained of. Although the injury may not have occurred but for the negligence of the former, his antecedent negligence may not be concurrent or simultaneous in such sense as to relieve the latter from the consequences of his negligence. In other words, when a plaintiff, by his negligence, has placed himself in a dangerous position, the defendant, advised of his situation, is not for that reason legally justified in failing to use reasonable care to not injure him. (*Davies v. Mann*, 10 M. & W. 546; *Austin v. New Jersey Steamboat Co.*, 43 N. Y. 75; *Silliman v. Lewis*, 49 id. 379; *Richmond & D. R. R. Co. v. Anderson's Admr.*, 31 Gratt. 812; 31 Am. Rep. 750; *Isbell v. N. Y. & N. H. R. R. Co.*, 27 Conn. 393; 71 Am. Dec. 78.)

While there is some apparent conflict in the cases of the different States on the subject of the effect of contributory negligence upon the remedy, the rule about which there is no occasion for serious controversy, is that to deny to a party relief for an injury suffered by him by the culpable negligence of another, his negligence must not only contribute to the happening of the injury, but must contribute to it as a proximate cause. His negligence as a remote cause, and creating a condition of peril from which he is unable to relieve himself, does not excuse the want of care in another to avoid injuring him.

For the purposes of the question in the present case, it may be assumed that the plaintiff, by his negligence resulting in the collision of the car with his wagon, was rendered helpless at another place on the defendant's railroad, where he was in a condition of danger from a passing car from which he was unable to extricate himself. He was, therefore, not chargeable with contributory negligence for not getting out of the way there of an approaching car. He did not voluntarily put himself in that position. His negligence that caused him to be there was antecedent, and not concurrent or simultaneously contributory to his injury there received. There was some evidence tending to prove that, by the exercise of ordinary care on the part of the defendant's servant having charge of the motive power of the car, the accident, such as it was at that place, may have been obviated.

These views lead to the conclusion that the consideration by the jury of the questions of fact arising upon the evidence relating to the occurrence last referred to should not have been made dependent upon the fact that the plaintiff's negligence did not contribute to the previous collision of the car with his wagon.

The plaintiff, by his complaint, alleges both the collision of the car with his wagon and the running of another car into or over him, and that this was occasioned by the negligence of the defendant. And, although those matters were alleged in a single count only of the complaint, it is not seen that upon the trial the liability for one of the alleged causes of the plaintiff's injuries could properly be made dependent upon that for the other of them.

The judgment and order should be reversed and a new trial granted, costs to abide the event.

All concurred.

Judgment and order reversed and new trial granted, costs to abide the event.

ELLEN J. COXHEAD, Respondent, v. ALBERT L. JOHNSON and JAMES M. EDWARDS, Appellants.

Negligence — a woman, crossing a street in the middle of a block, thrown down by a rope which was being slowly dragged along by horses — excessive verdict.

In an action to recover damages for personal injuries, it appeared that the defendants, who were engaged in stringing an electric cable from the girders of an elevated railroad structure situated upon a public avenue, used for the purpose a rope about 500 feet long, one end of which was attached to the cable and the other to a team of horses; that men were stationed along the rope from 150 to 160 feet or more apart, to warn persons of its existence, and to direct the movements of the horses; that the plaintiff, who came upon the avenue from a cross street, walked to the middle of the block, and while attempting to cross the avenue diagonally, after having previously looked both ways for surface cars, which were being operated upon the avenue, and having failed to observe the rope, the horses dragging it, or the warning motion which the watcher on the line of the cross street gave her, was knocked down by the rope, which was about one and one-quarter inches in diameter, of the color of the surrounding dust and dirt, and which was being slowly and noiselessly dragged either between the rails of the surface railroad or in the groove of one of the rails.

Held, that under the evidence the question whether the defendants had taken adequate means to protect persons who might be expected to be upon the street was one of fact for the consideration of the jury;

That the fact that the plaintiff crossed the street in the middle of the block was immaterial, even though it was very likely that, if the plaintiff had crossed the avenue upon the line of the cross street, the situation would have been such as to enable the watcher to give and the plaintiff to receive warning of the danger; That the question of the plaintiff's contributory negligence was one of fact for the jury.

A verdict for \$15,000 in favor of a plaintiff, a dressmaker earning \$2 a day, who sustained a fracture of the upper extremity of her left thigh bone, just outside of the hip joint, commonly called a broken hip, held to be excessive and reduced to \$10,000.

APPEAL by the defendants, Albert L. Johnson and James M. Edwards, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 12th day of March, 1897, upon the verdict of a jury, and also from an order entered in said clerk's office on the 15th day of March, 1897, denying the defendants' motion for a new trial made upon the minutes.

Henry Yonge, for the appellants.

Thomas E. Pearsall, for the respondent.

BRADLEY, J.:

The plaintiff, on the morning of July 5, 1894, in proceeding to cross Fifth avenue in the city of Brooklyn, stepped upon a rope which was moving along that avenue and fell. The consequence to her was a serious injury, which she charges was occasioned solely by the negligence of the defendants. Above and on the line of the avenue was an elevated railroad, and on the surface of the avenue was a double-track trolley railroad. At the time in question the defendants were engaged in stringing an electric cable on the girders of the elevated railroad structure, and for that purpose they used a rope, one end of which was attached to the electric cable, and at the other end was hitched a span of horses. By this means the rope was drawn along the street and the electric cable strung along on the girders above. There was evidence tending to prove that the length of the rope was 500 feet or more; that it extended from south of First street northerly to beyond Carroll street, and that 200 feet or more of it was dragged along on the surface of the avenue, between the rails of the westerly track of the trolley road. The plaintiff came out of Garfield place, a cross street, on the easterly side of the avenue, and, after going northerly on that side to about the middle of the block, proceeded to cross the avenue diagonally in a northwesterly direction to a drug store on the southwesterly corner of the avenue and Carroll street, which was the street next northerly from Garfield place, and on reaching the place in the avenue where the rope was moving along, she evidently stepped upon it and was thrown down. Her description of the occurrence after she left the easterly side of the avenue is: "I stepped off to make my way over the street, and when I got about half way something caught me around the feet and raised me up and I fell — threw me down on my side. I did not see any rope." She afterwards stated that something got her about the feet; that she did not mean to be understood that it went around her limbs, and that it was done so quickly that she had no time to know how it was done.

There is not much controversy about the facts. The contest related more to the inferences deducible from them than to the situation and occurrences.

The method adopted by the defendants in stringing the electric

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cable along the structure of the elevated railroad was the usual one, although the occasion to do that did not frequently occur. There seems by the evidence to have been some recognized danger to travel on the street occasioned by the use so made of it by the defendants. And to avoid injurious consequences to those traveling there, a person (Lawson) stood near the center of the avenue on the line of Garfield place, and another man (Ahlers) was on the east side of the avenue a short distance south of Carroll street, and the foreman (Valot) of the work was near the place on the avenue where the rope commenced slanting from its elevated attachment to the ground. Those persons were from 150 to 160 feet or more apart. One of the purposes of their being there was to give and transmit signals to the driver of the horses to stop and start up the team as desired. The horses were moving slowly at the time of the accident. If the dragging of the rope along the street rendered the travel upon it dangerous, the duty rested upon the defendants to use reasonable care to warn people on the street of the danger, and thus enable them to avoid it. Lawson testified that he saw the plaintiff when she started and proceeded to cross the avenue, and motioned to her to go back. "Q. What was she to look out for? A. For the danger. Q. What danger? A. The rope. Q. What rope? A. The running line. Q. You thought there was great danger that if she walked there she might step on it and get hurt? A. It was my place to tell the lady, sure." He added that he thought he was not over 100 feet away from her. The testimony of Ahlers is that he saw the plaintiff as she started and proceeded to cross the street, and that he saw Lawson beckon with his hand to her to stop; but that he could not hear him say anything. The foreman Valot testified that he saw the plaintiff when she had got near to the rope, and that he saw Lawson motion to her to go back. He also testified: "This rope was moving along in the street, and it was dangerous, and people might fall. * * * And we kept men at Garfield Place to warn people not to go over that rope, and to warn teams not to cross over it." The fact that there was some danger to travel, occasioned by the use which the defendants made of the street, was illustrated by the accident in question. And although this work so done by the defendants in the street was in itself lawful, they assumed the duty of exercising due care for the protection

of others against the hazards incident to such use so made by them of the street. This could be done either by having adequate means of warning persons upon the street against the danger, or by stopping the movement of the horses drawing the rope whenever persons were in any manner proceeding to cross the street. The former method would be the more practicable, and it could, without much difficulty, be so organized as to be effectual. Was it reasonably sufficient in this instance? The plaintiff testified that she heard no warning given to her, and, although she does not appear to have been asked whether or not she saw any beckoning motion made to her, nor to have testified that she did not, it cannot be here assumed that she saw or understood any such beckoning motion as was made to her. She says that she looked both ways, as she proceeded to cross, to see if any cars were approaching on the trolley road.

The avenue in that locality seems then to have been a business street. It is reasonable to suppose, as indicated by the evidence, that there was some noise in that vicinity, and none of the witnesses seem able to state whether or not the cars were then passing there on the elevated railroad. If the plaintiff had crossed the avenue on the line of Garfield place, on which she came to it, instead of going northerly to the middle of the block to cross it, it is very likely that her proximity to the place where Lawson was would have been such as to enable him to give, and her to receive, warning to avoid the danger. But she had the right to cross the street where she undertook to do so. And where streets are paved and in reasonably good condition for crossing, it cannot be assumed that people will not cross elsewhere than at what are known as street crossings. The contrary of such assumption has the support of daily observation. It is, nevertheless, true that less reason may exist to expect persons going elsewhere across streets than at the street crossings. This suggestion is peculiarly applicable to the operation of street surface railroads, in which there is no recognized legal excuse for not having the cars under control when they approach street crossings. (*Fenton v. Second Ave. R. R. Co.*, 126 N. Y. 625.) There is no well-defined rule of measure for what is termed due or reasonable care. What is such depends upon circumstances having reference to the hazards and consequences which may be encountered or apprehended. The question is a mixed one of law and fact. And the degree of care

required in any given case is such as a man of ordinary capacity and prudence might, in view of the circumstances, be expected to exercise. (*Unger v. Forty-second Street, etc., R. R. Co.*, 51 N. Y. 497.) In the present case, the men employed in the work had recognized signals for stopping the movement of the horses. This was effectually given immediately after the plaintiff fell. If they had apprehended the consequences of the omission to do so, they probably would, as they could, have stopped the team immediately before the accident to enable the plaintiff to proceed with safety. In view of the conditions as they existed about there, the conclusion was permitted from the evidence that the location of the men at the cross streets, 150 to 160 feet or more apart, did not constitute adequate means for warning persons who might reasonably be expected to go upon or across the avenue in that locality during the progress of the work there. And, in the view taken of the evidence, the question whether or not the defendants, in thus making use of the street, did all that was reasonably required of them for the protection of persons traveling or passing back and forth upon and over it was one of fact for the consideration of the jury.

The further question on the main issues is whether the plaintiff established by evidence her freedom from contributory negligence. She was also required to use reasonable care for her own protection, such care as persons may be expected to exercise under like circumstances. She was advised of the existence of the surface railroad, and she looked both ways to see that she would encounter no danger from approaching cars. That place in the street then appeared to her to be a safe place to cross. She says that she did not see the team of horses, which was a considerable distance northerly from her, drawing the rope. Nothing in the condition of the surface of the street appeared to her to require any particular attention in passing, and she apprehended no interrupting or disturbing cause to require unusual care and precaution in her progress over the street. The rope, an inch or an inch and a quarter in diameter, was moving noiselessly, and the evidence tends to prove that it had the color of the dust and dirt on the surface of the street. As to its particular location, some of the witnesses testified that it was between the rails of the south-bound track, and others testified that it was in what was called the

groove of the rail. It may be inferred that, if it was in the latter place, the rope was less prominently visible than it otherwise would have been, although it could be seen there without difficulty by a person whose attention was called to it. The right of the plaintiff to cross the street where she sought to do so was no different, and she was entitled to no less protection, than at a street crossing. (*Moebus v. Herrmann*, 108 N. Y. 349; *McClain v. Brooklyn City R. R. Co.*, 116 id. 459; *Thompson v. B. R. Co.*, 145 id. 196.) And, so far as related to the street itself, she was not required to exercise the same degree of vigilance that would be required of a person walking elsewhere than in a public street. She had the right to assume that the street was in reasonably safe condition for passage, except so far as she saw, or her attention was called to something to the contrary. Yet she was not at liberty to shut her eyes to the situation about her. (*Bird v. Long Island R. R. Co.*, 11 App. Div. 134; *Jennings v. Van Schaick*, 108 N. Y. 530; *Petengill v. City of Yonkers*, 116 id. 558.) In crossing the street, which had the appearance of safety, the plaintiff was not required on her way to search for hazards, and the conclusion was warranted that neither the nature, movement or location of the rope was such that, in crossing the street in the manner in which a reasonably discreet and prudent person usually crosses, it would necessarily have attracted the attention or had the observation of such person in approaching it. The question whether any negligence of the plaintiff contributed to her injury was one of fact for the jury. Our attention is called to *Strutt v. Brooklyn & R. B. R. R. Co.* (18 App. Div. 134) in support of the charge of plaintiff's contributory negligence. The injury there was caused by the plaintiff's intestate being tripped by a hose lying on the defendant's wharf. It was plainly visible. The view of the court in that case was that, as there was a hydrant on the wharf, and as on wharves and docks are often to be found articles temporarily deposited there, it was incumbent upon him to look and see whatever might have been temporarily left on the wharf in the line of his progress upon it. And Mr. Justice CULLEN, in delivering the opinion of the court, added: "As he (the traveler) goes along the highway he must anticipate the possibility of hydrants, of telegraph and electric light poles, hitching posts and carriage blocks, and also the fact that the use of the street may be tempo-

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rarily encroached upon lawfully by an adjacent owner either in the receipt of goods or in the improvement of his property." The things thus referred to by way of illustration are those only which are near the outer margins or on the sides of streets and frequently seen there. Those the traveler may be supposed to observe in the daytime, and they in that respect are clearly distinguishable from the condition produced by a rope lying in the middle of the street or in the groove of the rail of a surface railroad and moving by the application of power which the traveler has not observed. The *Strutt* case, in the view taken of it, does not seem to have any necessary application to the present one.

The verdict for \$15,000 is attacked as excessive. I am inclined to think that there is much force in the contention of the learned counsel for the defendants in that respect. The plaintiff was fifty-two years of age at the time of the trial in March, 1897. The injury she received was the fracture of the upper extremity of her left thigh bone just outside the hip joint, commonly called a broken hip. She was in bed at the hospital for about four months, and it was nearly another month before she was able to move about on a crutch. Her injury was serious, and in its effects will be permanent. She has suffered much pain, to which she is still, to some extent, subjected when she makes use of her limb. Her business, up to the time of her injury, was making and fitting dresses, which work she performed at the homes of others, and received two dollars per day and her board while thus engaged. She usually stayed at her own home nights. Her condition, produced by the injury, does and may continue to greatly impair her ability to perform such work, although not to disable her entirely in that respect. The plaintiff has a husband with whom she had not lived for about a year before the accident. Until she ceased to live with him she did not go out dressmaking. Since then she has supported herself. She is not separated from him by any decree. It is not assumed that they will live together again, or that the husband will contribute to the plaintiff's support. She is entitled to only compensatory damages. Notwithstanding the fact that the question of damages was fairly, with proper instructions, submitted to the jury, the verdict is deemed excessive in amount. And in the view taken of it, the judgment and order should be reversed, unless the plaintiff stipu-

lates to reduce the recovery of damages to \$10,000; and in that event the judgment should be so modified, and as modified, affirmed.

All concurred, except GOODRICH, P. J., who concurred in the result, except as to the amount of recovery, which should be reduced to \$7,500.

Judgment and order reversed and new trial granted, costs to abide the event, unless within twenty days plaintiff stipulates to reduce the recovery of damages to \$10,000, in which case the judgment is so modified, and as modified, is unanimously affirmed, without costs of this appeal to either party.

THE GOULDS MANUFACTURING COMPANY, Appellant, v. THOMAS MUNCKENBECK and Others, Composing the Firm of MUNCKENBECK BROTHERS, Respondents.

Sales — terms of credit in invoices cannot be varied by proof of a trade custom or of former dealings between the parties.

The unqualified acceptance by vendees, of invoices sent with goods sold, which contain the statement "Terms: 30 days," constitutes an adoption of such terms, which thus become part of the contract of sale, and entitles the vendors to recover interest after such thirty days, and such terms cannot, in the absence of any release supported by a consideration, be deemed to have been waived by force of a trade usage prevalent in the trade in which the parties are engaged, under which interest is not chargeable until vendors have furnished vendees with a further monthly statement of the account, nor will the contract be affected by proof of former dealings between the parties in which the vendors rendered such monthly statements to the vendees.

APPEAL by the plaintiff, The Goulds Manufacturing Company, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of Kings on the 2d day of December, 1896, upon the verdict of a jury, and also from an order entered in said clerk's office on the 14th day of December, 1896, denying the plaintiff's motion for a new trial made upon the minutes.

Henry Marshall, for the appellant.

T. Ellett Hodgskin, for the respondents.

BRADLEY, J.:

The subject of the controversy is the interest upon the price of a quantity of goods sold and delivered by the plaintiff to the defend-

ants, who composed the firm of Munckenbeck Brothers. There is no question about the nature, quantity or price of the goods sold or of the time of the sale and delivery of them. They were ordered by the defendants from time to time in the years 1891 and 1892, and following the orders respectively the goods, with invoices of them, were delivered to the defendants. In these invoices it was stated that the Goulds Manufacturing Company sold to Munckenbeck Brothers, "Terms: 30 days," the goods at the prices there mentioned. The plaintiff, treating the terms of credit for the goods as designated and adopted by the parties, sought to recover interest upon the principal sum unpaid from and after the expiration of the thirty days following the time of the sale and delivery of the respective bills of goods. The apparent import of the invoices accompanying the goods was that they were sold and delivered upon a credit of thirty days, and such was the apparent effect as between the parties when the goods and the invoices were received by the defendants, without any objection, protest or qualification. It follows that, unless something further intervened to modify such effect, the term of credit so expressed constituted part of the contract of sale (*Dent et al. v. North American Steamship Company*, 49 N. Y. 390; *Metropolitan Manufacturing Company v. Dunning*, 2 N. Y. St. Repr. 711); and, as a consequence, the plaintiff would be entitled to interest from the time of default in payment arising from the failure to pay at the expiration of the thirty days after the delivery of the bills of goods respectively. (*Van Rensselaer v. Jewett*, 2 N. Y. 135; *Adams v. The Fort Plain Bank*, 36 id. 255.)

This rule of law is so familiar and common in its application to ordinary business transactions as to require the expression of no further consideration. It is, however, urged on the part of the defendants that, by reason of a custom in the plumbing trade, in which they were engaged, they were not in default for not paying the bills for the goods on the expiration of the thirty days, but that to put them in default it was necessary for the plaintiff to furnish them with a further statement of the goods, and that the observance of the custom required that the statements be furnished monthly or on the first of each month. The defendants gave evidence tending to prove that their habit had been to receive monthly statements of goods delivered during the preceding month; that

they were examined, and if found correct, paid; and that the invoices when received were checked off, and if found to correctly represent the goods received, were laid aside; that they had dealt with the plaintiff several years; that prior to the time of the commencement of the delivery of the goods in question in 1891, the plaintiff had furnished monthly statements to them, and that they gave no attention to the terms of credit expressed in the invoices. The evidence of the defendant who testified on the subject related mainly to the dealings of his firm in buying and selling plumbing materials. It does not appear that any person of whom they purchased goods, other than the plaintiff, placed any terms of credit in their invoices. The evidence on the part of the defendants is to the effect that the habit in their dealings had been to receive and furnish monthly statements upon which to make and receive payments of bills of goods. The evidence by which the defendants sought to prove usage in the trade was received against the objection of the plaintiff's counsel, that the matter of the custom of the plumbing trade had no application to the plaintiff's claim for interest. The method adopted by the plaintiff, as appears by the terms expressed in its invoices of goods sold, was to sell them on a credit of thirty days. The defendants had the invoices, and were thus advised of the terms of the sale and credit when the goods were received. The unqualified acceptance of them was an adoption of such terms, which thus became part of the contract of the sale and purchase of the goods. They appear in the contract, and nothing is found in the evidence to take those terms from it or to deny to them the effect which they purport to have. And being part of the contract, without any ambiguity, the terms of credit, like any other provision of the contract, are not subject to be overcome by mere usage or custom of the trade in which the defendants are engaged. (*The Mutual Safety Ins. Co. v. Hone*, 2 N. Y. 235; *Howell v. Dimock*, 15 App. Div. 102.) The rule is well established that parties dealing and contracting as to matters in relation to which there is a uniform, continuous and well-settled custom, are presumed to contract in reference to such custom when nothing appears in the contract to the contrary. (*M'Allister v. Reab*, 4 Wend. 485; *Esterly v. Cole*, 3 N. Y. 502; *Walls v. Bailey*, 49 id. 464; *Newhall v. Appleton*, 114 id. 140; *Atkinson v. Truesdell*, 127 id. 230.)

It will be seen by reference to the cases just cited that such rule relating to usage applies to dealings between parties, only when the terms of their contract are such as to permit its application without conflicting with them. When a custom or usage is not consistent with the terms of a contract between parties, the latter necessarily, in legal effect, governs their rights. It is, however, suggested by counsel that if the terms of credit in the invoices are treated as an essential part of the contract, they could be waived by the plaintiff, and should be treated as waived by force of the usage referred to, and in view of the former dealings between the parties.

There is a marked difference between the waiver of strict performance of a condition precedent, and the discharge of a person from legal liability which he has assumed by the contract. The cases cited by the learned counsel for the defendant relate to the former, which requires no consideration for its support, as well as those referring to circumstances which may be productive of equitable estoppel. They have no necessary application to the question of releasing a party to a contract from the legal obligation which he has assumed by it. A consideration is essential to such a release. (*Crarford v. Millsbaugh*, 13 Johns. 87; *Jackson v. Stackhouse*, 1 Cow. 122.) As has been observed, the legal effect of the terms of the contract was such that interest began to accumulate on the expiration of the specified credit, and as the interest accrued it became part of the debt for which the defendants could not become relieved without payment, or by release having the support of a consideration. Neither is claimed as a defense.

On the conceded fact that the terms of credit were expressed on the face of all the invoices of the goods in question, we think that the plaintiff was entitled to the verdict which the court was requested by its counsel to direct, and that the exception to the denial of such request was well taken.

The judgment and order should, therefore, be reversed, and a new trial granted, costs to abide the event.

All concurred.

Judgment and order reversed and new trial granted, costs to abide the event.

ADOLPH H. LAZARE, Appellant, v. HENRY ALLEN and EDWARD L. NORTON, Respondents.

Stockbrokers cannot buy in stock for a customer, operating upon a margin, until they have made a reasonable demand for additional margin — when the questions of fact are to be decided by the court — how considered on appeal.

A broker who has sold stock "short" for a customer, upon a "margin," cannot, where a rise in the stock has made more margin requisite to secure him against loss, without the customer's order or consent, close the transaction by buying in stock for the customer's account, without giving him a reasonable notice to furnish more margin.

The reasonableness of the notice is dependent upon the circumstances of the particular case.

Where both parties request the direction of a verdict in their favor, and neither requests the submission of any question to the jury, the questions of fact are for the court and are to be determined, upon appeal, in support of the verdict directed.

APPEAL by the plaintiff, Adolph H. Lazare, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of New York on the 29th day of November, 1895, upon the verdict of a jury directed by the court.

This appeal was transferred from the first department to the second department.

John R. Dos Passos [*Edmund Francis Harding* with him on the brief], for the appellant.

William P. Quin [*John D. Kernan* with him on the brief], for the respondents.

BRADLEY, J. :

The defendants were brokers in the city of New York, doing business in the firm name of Henry Allen & Co. The plaintiff became their customer in a transaction by which 300 shares of the capital stock of the Louisville and Nashville Railroad Company were sold short on his account, about September 12, 1893 (200 of the shares at 54½, and 100 shares at 54¼), on a margin, for which the plaintiff deposited with the defendants \$1,000.

This was a speculative venture of the plaintiff, to be consummated by buying in the stock through the agency of the defendants, upon

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the direction of the plaintiff. They by their relation to the business undertook to obey his orders in that respect if he kept them protected by a sufficient fund to adequately cover the margin. It was within the contemplation of the parties to the contract that if the plaintiff, upon reasonable notice, should fail to do so, the defendants would be at liberty to purchase on his account for their own protection. On September twenty-sixth the plaintiff sent his order to the defendants to make the purchase of the stock to cover the sale short before mentioned. The price of the stock had then fallen to fifty-one and one-half on the market. A purchase at that price would have given the plaintiff a profit of \$925. For the alleged failure of the defendants to obey that order the plaintiff seeks to recover as damages that sum, together with the amount so deposited with the defendants as margins. Upon such a state of facts the plaintiff would have been entitled to recover the amount claimed. (*Campbell v. Wright*, 118 N. Y. 594; *Rogers v. Wiley*, 131 id. 527.)

But on the part of the defendants it is claimed that the plaintiff was in default in not furnishing money to make good and take care of the short sale; that as a consequence they had, on September twenty-second, bought in the stock on the plaintiff's account at fifty-six, which purchase left to his credit only sixty-four dollars and thirty-five cents, and that he was entitled to recover only that amount. The purchase was made without any order from the plaintiff, and to support it as made on his account it was essential to the defense that it be made to appear that there was occasion to call upon the plaintiff to make further deposit for the protection of the defendants, and that he failed to do so after having reasonable notice prior to the purchase to furnish the money. (*White v. Smith*, 54 N. Y. 522.) This was the implied provision of the contract pursuant to which the sale of the stock short made by the defendants was to be taken care of by them on the plaintiff's account and for which they remained responsible until the short sale was covered by purchase. There were no special stipulations in the arrangement between the parties to take the transaction out of the general rule applicable to such ventures as between a principal and his broker's agency.

On the part of the defendants evidence was given tending to

prove that on September eighteenth the price of Louisville and Nashville Railroad Company's stock ranged from fifty-three and three-eighths, the lowest, to fifty-six at the highest; and that on that day the plaintiff was informed by the defendants that the stock had advanced to fifty-six, and that they would have to have more money immediately on that account or they could not carry it any longer; that the plaintiff neither put up any more money nor promised to do so; that on the next day the price of the stock ranged from fifty-four and one-half to fifty-five and one-eighth, and on September twentieth from fifty-four and one-fourth to fifty-five; and that on each of those days the like notice and request were given and made upon him in behalf of the defendants with the same results; that on September twenty-second the price of the stock opened in the market at fifty-six and three-eighths; that to purchase the stock at such price would require a sum in excess of that then to the plaintiff's credit in his account with the defendants, and that the apparent condition was such when the stock stood at fifty-six and three-eighths that the plaintiff was indebted to them. They gave evidence to the effect that between ten and half-past ten in the forenoon of that day (September twenty-second) their agent, who was sent to the plaintiff, called on him at his office, which was about a block distant from their office, and told him that the defendants wanted additional margins right away; that the plaintiff then said that "he would go up and see his friend and would bring the money down at once, immediately, if his friend was in;" that the stock was purchased by the defendants about twelve o'clock, noon, of that day, and notice of the purchase sent to the plaintiff's office; that about half-past twelve o'clock the plaintiff appeared at defendants' office, was then advised of the purchase made on his account, he having stated that he had not been at his office since the notice was sent there. Afterwards, on the same day, the plaintiff returned the notice, with a note to the defendants that he would not accept it as he had given no order to cover, and that he was ready to put up additional margin. The plaintiff does not adopt as true the evidence on the part of the defendants relating to the interview with him on the eighteenth and nineteenth days of September; says he has no recollection of such conversations, and denies that he was then asked to put up more margin. His evi-

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dence also is that after the interview with defendants' agent on September twenty-second, he was at the defendants' office at half-past eleven o'clock. This was about an hour after he was notified to furnish more money to defendants. Whether that is a reasonable notice to justify a broker to cover a transaction and close the deal with the customer without his order or consent, depends upon circumstances. (*Cameron v. Durkheim*, 55 N. Y. 425.) In any view which may be taken of the occurrence of the twenty-second of September, standing alone, the notice to supply more money prior to the purchase which the defendants assumed to make on the plaintiff's account, cannot well be deemed to have been reasonable in point of time. While the stock opened at fifty-six and three-eighths, the price had dropped to fifty-six when the purchase was made, and no circumstances appear which fairly justified the defendants, for their protection, in making the purchase to cover the sale within an hour and a half. It is true that, according to the evidence on their part, the defendants were not advised that the plaintiff would be able to supply the margin required. He seems not to have had means himself, but was dependent upon his friend, from whom he sought to obtain it. His evidence is that when he went to defendants' office, following such notice on that day, he had arranged for the money, and that he then advised them that the check would be there in a few moments to be put up. The evidence on the part of the defendants is that they offered to take the money from the plaintiff and replace the stock at the price at which they had purchased it, replace him in the same position he was in at and immediately preceding the time of the purchase. This he declined. The only evidence that he had made arrangements to get the money and that it was ready and would be there for the purchase, was in the testimony of the plaintiff alone. He says that he had no money of his own, and that his only chance of getting it depended upon somebody else. It is said not to be unusual for such to be the condition of persons who, like the plaintiff, have had a long experience in dealing in futures. He says that for about forty years he had been engaged more or less in stock transactions, buying and selling long and short, on margins, and understood the nature of the business. The evidence tends to prove that the condition of the stock market was a matter of his daily observation.

Now, to go back to the occurrences of the eighteenth and nineteenth of September, as represented by the evidence on the part of the defense, it appears that the plaintiff manifested no purpose to comply with the notice and request to supply further margin. There was on those days an upward tendency of the stock ; and as the defendants had to borrow the stock from day to day and pay the current premium, and as the fund deposited for margin was but a small percentage, it cannot be seen that they were not justified for their protection in calling on those days upon the plaintiff for more money. Whether he was so called upon was a disputed question of fact for the jury, and if they found upon it in the affirmative, they may have declined to find that he had the money ready for use on September twenty-second, and, as bearing upon the question of his purpose in that respect, his refusal to permit the defendants to restore him to the position in which he was at the time of the purchase might not have been entirely without significance. It would seem to follow that whether or not the plaintiff, after reasonable and proper notice to furnish money for margin, was in default in that respect, was a question of fact upon the evidence. As the appeal is from the judgment alone, that question is not here for consideration, and as the plaintiff as well as the defendants requested the direction of a verdict, and requested no submission to the jury, any question of fact is deemed to have been treated as for the court, and determined in support of the verdict directed. (*Koehler v. Adler*, 78 N. Y. 287.)

These views lead to the conclusion that the judgment should be affirmed.

All concurred.

Judgment affirmed with costs.

NOTE.—The rest of the cases of this term will be found in the next volume, 21 App. Div.—[REF.]

DECISIONS

IN

CASES NOT REPORTED IN FULL.

SECOND DEPARTMENT, JULY TERM, 1897.

- Columbia M. Binny, Respondent, v. Joseph Carney, Appellant.**—Motion for leave to appeal to the Court of Appeals denied.—**PER CURIAM:** The request to charge was properly declined. The defendant's agent was bound to take precautions against danger, not only to persons whom he either knew or had reason to believe were approaching the hole, but as to those persons whom it was probable, in the ordinary use of the premises, might approach the hole, and such was the charge of the court. All concurred.
- William F. Donovan, Respondent, v. Carrie E. Hine, Appellant.**—Order reversed, with ten dollars costs and disbursements, to abide the event. The averment that the defendant has no knowledge or information sufficient to form a belief is equivalent to a denial of such knowledge or information, under section 500 of the Code. It may be false, but it is not frivolous.
- Augustus V. H. Ellis, as Committee, etc., of Margaret McConnell, an Incompetent Person, Respondent, v. Florence De Castillia, Appellant, Impleaded with Others.**—Judgment affirmed, with costs. All concurred. No opinion.
- Marie J. Fitzmahoney, as Administratrix, etc., of Michael J. Cody, Deceased, Appellant, v. George Caulfield and Ellen Caulfield, Respondents.**—Order reversed, on authority of *Good v. Daland* (119 N. Y. 153). The admission was merely that the attorney had been served with a copy of the paper, not that the paper was a correct copy of the judgment. Plaintiff's motion granted. No costs of this appeal; but appellant may have her disbursements.
- Elizabeth Meister, as Administratrix, etc., of Conrad Meister, Deceased, Appellant, v. Sharkey Monument Works, Respondent.**—Order modified so as to impose as a condition of granting the relief prayed for that bill of particulars be served within twenty days and that within a like period the defendant pay to the plaintiff the trial fee and the disbursements of the second trial and ten dollars costs of motion and the disbursements on this appeal, and as modified, affirmed, without further costs to either party. All concurred. No opinion.
- Clara B. Morely, Respondent, v. Brooklyn Elevated Railroad Company, Appellant.**—Judgment modified by striking out the provision that the plaintiff recover absolutely the award for fee damages, and as modified, affirmed, with costs. All concurred, except Cullen, J., not sitting. No opinion.
- In the Matter of the Application of Lorenzo D. Fleming.**—Application granted, and applicant may take the oath at the opening of the court on any day.
- In the Matter of the Application of the Staten Island Midland Railroad Company.**—Objections overruled. Objectors must file answers within five days, and the issues that may be joined are hereby referred to George W. Wingate to take proof as to the same, and report his opinion thereon. Reference to proceed on five days' notice.
- Charles A. Von Urrf, Respondent, v. The City of Brooklyn, Appellant.**—Judgment and order unanimously affirmed, with costs. No opinion.
- John Burkitt, as Administrator, etc., of Francis E. Burkitt, Deceased, Respondent, v. Charles B. Webster, Isidor Straus and Nathan Straus, Appellants.**—Judgment and order unanimously affirmed, with costs. No opinion.
- James Carr, Respondent, v. Nassau Electric Railroad Company, Appellant.**—Judgment and order unanimously affirmed, with costs. No opinion.
- Stephen L. Canniff, Respondent, v. Nassau Electric Railroad Company, Appellant.**—Judgment and order unanimously affirmed, with costs. No opinion.
- William Frey, Respondent, v. Nassau Electric Railroad Company, Appellant.**—Judgment and order unanimously affirmed, with costs. No opinion.
- Margaret Gilchrist, Respondent, v. Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company, Appellant.**—Judgment and order reversed and a new trial granted, costs to abide the event, unless within twenty days plaintiff stipulates to reduce her recovery of damages to \$5,000, and extra allowance proportionately; and in case of such stipulation, judgment, as reduced, unanimously affirmed, without costs. No opinion. Goodrich, P. J., not sitting.
- Louis Marcus and David Dembow, Respondents, v. Charles Hamberger, Appellant.**—Judgment affirmed, with costs. All concurred. No opinion.
- Margaret Morris, Respondent, v. Augustus P. Stevens and Jane A. Van Da Linda, Composing the Firm of A. P. Stevens & Company, Appellants.**—Judgment affirmed, with costs. All concurred. No opinion.
- In the Matter of the Application of Ellery O. Phillips for his Admission to Practice as an Attorney at Law in the State of New York.**—Application granted, and applicant may take the oath at the opening of the court on any day.
- Trapagnier & Brothers v. Rose.**—Application granted.

FOURTH DEPARTMENT, JULY TERM, 1897.

Peter McFarland, Respondent, v. New York Central and Hudson River Railroad Company, Appellant.—Order affirmed, with costs.—**FOLLETT, J.** (dissenting): The court charged as follows: "Did he, in making that coupling, because he did make it, perfected it, the coupling was done, did he, in getting away his hand from the place where the coupling was made, exercise for his own safety all that reasonable care which an ordinarily prudent and careful man would exercise in his own behalf? What is the test of that? The test is, simply put yourself in his place. There is no more proper test for you to apply. Every jurymen is supposed to be of ordinary degree of perfection of his faculties, of ordinary ability to exercise his faculties, of presence of mind. Let each jurymen, then, for himself, in determining this question, put himself exactly in the place of this plaintiff, and say whether, had I, the individual jurymen, been there as brakeman, required to make that coupling, would I have done as the plaintiff did, would I have omitted anything which the plaintiff omitted." To this instruction the defendant excepted. This instruction, I think, was error. The test is not what a person without experience in the business would have done, but what an experienced brakeman, having knowledge of the duties of his service, should have done. The care and diligence required was that which a person skilled in the business should have exercised. Whether the plaintiff exercised due care should have been determined by the jury, upon the evidence, and not by allowing them to imagine themselves to have been in the place of the brakeman and permitting them to determine the question of diligence by what they would have done under the circumstances. Permitting jurymen to imagine themselves in the place of a plaintiff engaged in a service requiring special skill and knowledge, and instructing them that they may determine whether the plaintiff contributed by his negligence to the accident by the test of what they would have done under the circumstances is error. Suppose the question had arisen whether an employer operating a railroad or a factory filled with complicated machinery, exercised due care in permitting the equipment or machinery complained of to be used, would it be proper to instruct jurymen unskilled in the business, to imagine themselves in the place of the employer and say what they would have done under the circumstances, and that if they would have done as the employer did, negligence was not shown? I think not. The question of negligence or diligence must be determined on the evidence in the case and not upon what the jurymen would have done, or omitted to do, had they been in the place of either party. On the first appeal it was held (9 App Div. 623) that the evidence did not justify the jury in finding that the position of one of the bumpers on the Pittsburg, Fort Wayne and Chicago car No. 7609 was the cause of the accident, and I am of the opinion that the evidence contained in the present record is not sufficient to justify the submission to the jury of the question whether the position of the bumper was the cause of the accident. The order denying defendant's motion made on the minutes for a new trial should be reversed, and a new trial granted, with costs to abide the event. Green, J., concurred.

Hannah Smith, as Administratrix, etc., of George W. Smith, Deceased, Appellant, v.

The Empire Transportation Company, Respondent.—Judgment and order affirmed, with costs. Appeal from a judgment dismissing the complaint on the merits, entered on a verdict in favor of the defendant, and from an order denying a motion for a new trial made on the minutes.—

PER CURIAM: This action has been twice tried. On the first trial the plaintiff recovered a judgment, which was reversed. (89 Hun, 588.) On the trial under review, the evidence contained in the record on which the first appeal was heard was read, no new evidence being offered by either party. The judgment and order are affirmed, with costs, on the opinion reported in 89 Hun, 588. All concurred.

John H. Stooks, Appellant, v. John B. Foote, Respondent.—Judgment and order affirmed, with costs.—Before a jury and court at a Trial Term on the 6th of May, 1896, the action was tried, resulting in a nonsuit. Thereafter, on a case and exceptions, a motion was made for a new trial and denied, and there is an appeal here from the order and the judgment entered dismissing the plaintiff's complaint. The complaint alleges that "on or about the 24th day of October, 1895, at the town of Mount Morris aforesaid, the said defendant Foote wrongfully and negligently set fire to a quantity of brush and stumps upon lands near by those of plaintiff herein, and wrongfully and negligently left the same burning in and near a quantity of dead leaves and other combustible material, by reason of which wrongful and negligent act the fire in question spread to and upon the lands and premises of plaintiff, burning and destroying plaintiff's fences, a large quantity of firewood, and valuable trees and growing timber." The answer contained denials of the complaint, and an averment that if the defendant set any fires "he used due care and diligence in and about setting said fires and guarding the same; and that said injury complained of was not caused by any wrongful or negligent act on the part of the defendant."

HARDIN, P. J.: I think the plaintiff failed to give evidence sufficient to require the court to submit the question of the defendant's alleged negligence to the jury, and that the nonsuit was properly granted, and the order denying the motion for a new trial on a case and exceptions was proper. (*Frier v. D. & H. C. Co.*, 86 Hun, 465; *Miller v. N. Y. C. & H. R. R. Co.*, 92 id. 283; *Brown v. B. & P. R. R. Co.*, 4 App. Div. 455.) The doctrine laid down in *Ryan v. N. Y. C. R. R. Co.* (35 N. Y. 219) has been limited and qualified. (*Webb v. R. W. & O. R. R. Co.*, 49 N. Y. 427; *Cornick v. Farm Buildings Fire Ins. Co.*, 74 id. 326; *Lowery v. Manhattan Railway Co.*, 90 id. 166; *Flinn v. N. Y. C. & H. R. R. Co.*, 142 id. 11; *Frace v. N. Y., L. E. & W. R. R. Co.*, 143 id. 188.) I think the judgment and order should be affirmed, with costs. All concurred, except Follett, J., not sitting.

Ellen Demings, Respondent, v. The Supreme Lodge Knights of Pythias of the World, Appellant.—Judgment affirmed, with costs, on the opinion of Henry F. Allen, referee.—All concurred, except Follett, J., not sitting. The following is the opinion of Henry F. Allen, referee.—

HENRY F. ALLEN, Referee: This action was brought to recover the sum of \$1,000 and interest, upon a beneficiary certificate issued by the defendant to one George Demings, whereby the defendant, in consideration, among other things, of the payment to the endowment rank of the defendant of all the

assessments required, and the full compliance with all the laws governing the said rank then in force or that might thereafter be enacted, and of the good standing of the said George Demings, under the said laws, promised to pay to Ellen Demings, the plaintiff herein and beneficiary named in said certificate, or to such other person or persons as the said George Demings might subsequently direct by will or otherwise, the sum of \$1,000, upon due notice and proof of death and good standing of the said beneficiary. In the certificate issued to the said Demings it is recited that he has received the endowment rank of the Order Knights of Pythias in section 491, and is a member in good standing in said rank. It was conceded upon the trial that the defendant is a foreign corporation created under the laws of the District of Columbia for the purposes stated in the complaint; that on the 8th day of May, 1881, the said Demings became a member of section 491 of the endowment rank of the defendant, which section was located at Buffalo, N. Y.; that the said Demings died February 6, 1885; that the plaintiff is the beneficiary named in the certificate issued to the said Demings; and that at the time of the death of Demings there were at least 1,000 members in the class of the endowment rank in which he held a certificate. It was also admitted that the plaintiff gave due notice to the defendant and section 491 of the death of Demings, and requested the said section to furnish her with forms for the purpose of making proofs of death, which were refused, and that the plaintiff thereafter caused to be prepared proofs of the death of the said Demings, and served the same upon the defendant and said section 491, December 28, 1885; and that the plaintiff duly demanded payment of the said sum of \$1,000, which was refused. In the complaint it is alleged that the said Demings, in his lifetime, duly complied with and performed all the terms and conditions of the contract upon his part, and that he complied with all the laws, rules and regulations governing said defendant and said section 491, and that the contract and agreement of the said Demings with the defendant was in full force at the time of his decease. These allegations of the complaint are denied by the answer, and in the 6th clause of the answer it is alleged that on or about the 23d day of November, 1884, an assessment was duly made in pursuance of the laws governing said endowment rank upon the said George Demings among others; that due and proper notice of such assessment was given to and received by the said George Demings pursuant to the by-laws of the defendant, and that the said Demings neglected and refused to pay said assessment, and for failure to pay the same as required was duly suspended from said class of the endowment rank and forfeited all claims upon the endowment fund belonging to said class, as provided in and by said constitution and by-laws. Demings' application for membership, the certificate issued to him, and the general laws and constitution of the defendant, formed his contract with the defendant. Article 5, section 4, of the general laws of the endowment rank of the defendant provides that "if after paying a benefit there remain in the fund belonging to the class of which the deceased was a member a less sum than is sufficient to pay a benefit in that class, the Supreme Secretary shall immediately notify the Secretary of each Section to collect and forward to him an assessment of \$1.10 from each member of said class, which must be paid within thirty days." Article 6, section 5, of the constitution of the said endowment rank,

treating of its officers and their duties, provides that the section secretary shall, among other things, "upon receipt of notice of an assessment from the Supreme Secretary, promptly forward the same to that officer, and give notice to each member of the class in which the assessment is made in the prescribed form and notify him to pay it within thirty days," and in article 8 of the constitution, section 1, it is provided "upon receiving notice of an assessment each member shall at once pay the assessment to the Secretary of the Section to which he belongs. If any neglect for thirty days after date of notice to pay said assessment, he shall stand suspended from that class of the Endowment Rank for which said assessment was made, and shall forfeit all claims upon the Endowment fund belonging to that class, and the fact of such suspension shall be reported to the Supreme Secretary upon the remittance blank, provided that any member thus suspended shall have the privilege of regaining his right in said class within three months by passing a new medical examination and paying all assessments that may have accrued up to the time of reinstatement." Article 4, section 1, of the constitution provides that "Secretaries will also collect from new members applying for additional class or classes one dollar and ten cents for each class, to be held in surplus to meet the first assessment to which they may become liable." Attention has been called to all of the provisions of the general laws and constitution of the defendant which are pertinent to the issues involved, and the question for determination is as to whether Demings was in default for non-payment of the assessment of November 22, 1884. That this assessment was made and that Demings received due notice thereof, I think the evidence fairly establishes. That it was properly made was presumptively shown as decided by the Court of Appeals in this case (181 N. Y. 532-537); but the evidence in my judgment shows that this assessment was in point of fact actually paid to and received by the defendant, and Demings was, therefore, unlawfully suspended for non-payment thereof, and so far as the payment of such assessment was concerned was in good standing with the defendant at the time of his decease. The evidence shows that Demings paid the admission fee and all other sums required of him at the time of his admission into the endowment rank of the defendant, including the one dollar and ten cents required by the provisions of section 1, article 4 of the constitution, to meet the first assessment for which he would be liable. It is also shown that the first assessment made upon Demings was August 22, 1881, which assessment was known as assessment No. 28. This assessment was paid with the one dollar and ten cents which was paid in advance by Demings under the provisions of the constitution above quoted, section 1, article 4. Mr. Stolte, the secretary of the board of control of the defendant, was called by the defendant and testified that he was familiar with the defendant's records and had charge of its business. He further testified that the first assessment charged to Demings was assessment No. 28; that the section secretary was notified to forward this assessment to the supreme secretary of exchequer, which he did by using the funds received in Demings' case from the advance assessment one dollar and ten cents; that the section secretary then notified Demings to pay assessment No. 28 within thirty days from date of issue, August 22, 1881, to provide for the next assessment; that assessment No. 29 was made September 23, 1881,

and the section secretary was required to immediately forward the assessment, using the funds in Demings' case that he had received from assessment No. 28 and to notify Demings to pay assessment No. 29 within thirty days from September 26, 1881, to provide for the next assessment No. 30, and this course of business the witness testifies was pursued through all the assessments down to and including the assessment made November 22, 1884, known as assessment No. 66, with reference to which it is alleged Demings was in default, and that the section secretary was required to forward assessment No. 66 November 23, 1884, and that he did so by using the funds received from assessment No. 65; and the books of the defendant, which are in evidence, show that thirty-nine assessments in all were charged to Demings, being assessments 28 to 66 inclusive, all of which were paid by him in the manner indicated. It follows, in my judgment, upon this state of facts, that there was no authority for the suspension of Demings for the non-payment of assessment No. 66, and that he did not legally stand suspended therefor, the defendant having funds of Demings with which to pay the same, derived from assessment No. 65, and having so applied the same, and that, therefore, the defense of forfeiture interposed by the defendant is not sustained. The defendant upon the trial offered to show the non-payment of assessment No. 67, and gave evidence tending to show such assessment notice thereof to Demings, and non-payment of the same by him, but this evidence was received subject to the power of the referee to strike the same out if the same should be deemed inadmissible. It is not very clear what the effect of this evidence would be if admitted, Demings having been suspended for the non-payment of assessment No. 66, but I am of the opinion that under the answer this defense is not maintainable and that this evidence should not be received. The defense set up by the answer is a forfeiture for failure to pay an assessment made November 22, 1884. This is concededly assessment No. 66. To admit the evidence of non-payment of assessment No. 67 would establish a different forfeiture, and, therefore, a different defense from that pleaded. Default in proof of compliance with the conditions of the certificate or of the contract upon the part of Demings upon which the defendant attempts to establish a forfeiture should be pleaded. (*Baumiller v. Workingman's Co-operative Association*, 9 Misc. Rep. 157; *Richmond v. Niagara Fire Insurance Co.*, 79 N. Y. 237.) The non-payment of premiums is an affirmative defense. (*Elmer v. Mutual Benefit Life Assn. of America*, 47 N. Y. St. Rep. 35; S. C., 19 N. Y. Supp. 289; aff'd., 138 N. Y. 642.) The defendant insists that because of the allegation in the complaint of the compliance by Demings with the terms and conditions of his contract, and the laws, rules and regulations governing the defendant, and of the denial thereof by the defendant by its answer, that it is entitled to make this proof, but I think otherwise. The allegations of the complaint did not impose the burden upon the plaintiff of proving them in each particular. (See cases above cited.) The good standing of the deceased was established by the certificate put in evidence, and such good standing was presumed to continue, and the burden was upon the defendant to establish that the deceased had lost his good standing. Opinion, Childs, J., in this case (60 Hun, 350, 353) in this respect not questioned. Upon the admissions and facts conceded the plaintiff's case was made by the production of the certificate. To ob-

viate this defect in the answer the defendant has asked to amend its answer by conforming it to the facts proved. My power to allow this amendment is, I think, somewhat questionable. Section 723 of the Code provides that the court may, upon the trial, conform the pleading to the fact proved when the amendment does not change substantially the claim or defense. This would be a defense of the same general character, but it is a separate and distinct defense from that pleaded. An amendment setting up a new defense, under the authorities, cannot be allowed upon the trial, but, irrespective of such question, I think, in view of the circumstances, the amendment involving a forfeiture, that it should not be allowed. No other questions have been raised by the defendant, and the views which I have expressed lead to the conclusion that the plaintiff should recover the amount of the certificate issued to the deceased together with interest.

Fannie Burlingame, Respondent, v. The Village of Perry, Appellant.—Judgment and order affirmed, with costs. All concurred, except Follett, J., not sitting.

Seraph M. Chamberlain, Respondent, v. Ella V. Gleason, and Another, Appellants, Impleaded, etc.—Judgment affirmed, with costs. All concurred.

Jeremiah M. Cadagan, Plaintiff, v. The New York Central and Hudson River Railroad Company, Defendant.—Plaintiff's exceptions overruled and motion for a new trial denied, with costs. All concurred, except Follett, J., not sitting.

The Chicago Daily News Company, Respondent, v. Bernard Rothschilds and Others, Appellants.—Judgment and order affirmed, with costs. All concurred, except Follett, J., and Adams, J., not voting.

Alfred Cross, Appellant, v. Francis Curnan and Ernest Hockstadter, Respondents.—Judgment affirmed, with costs. All concurred.

Margaret L. Dearborn, Respondent, v. The City of Jamestown, Appellant.—Judgment affirmed, with costs. All concurred.

Nathaniel B. Ellison and Others, Respondents, v. Joseph A. Smith and Clara L. Smith, Appellants.—Judgment affirmed, with costs. All concurred, except Follett, J., not sitting.

Robert M. Hodgson, Respondent, v. The National Accident Society of the City of New York, Appellant.—Judgment of the County Court of Monroe county modified so as to reduce the recovery to the sum of forty dollars and interest thereon from June 1, 1896, and by striking therefrom the costs of the County Court, and as so modified the judgment is affirmed, without costs to either party in this court.

Valentine Heller, Appellant, v. The New York Central and Hudson River Railroad Company, Respondent.—Judgment affirmed, with costs. All concurred, except Green and Ward, JJ., dissenting.

Lydia Lucas, Appellant, v. Frank Berry and Others, Respondents.—Judgment affirmed, with costs. All concurred, except Follett, J., not sitting.

David D. Lent, as Receiver, etc., of Henry D. Shear, and John Walker, Respondents, v. Henry D. Shear and Sarah H. Shear, Appellants, Impleaded with Clara H. Guess.—Judgment affirmed, with costs. All concurred, except Adams, J., dissenting. Follett, J., not sitting.

Edwin W. Montgomery, Respondent, v. Buffalo Railway Company, Appellant.—Reargument ordered. Follett, J., not sitting.

In the Matter of the Judicial Settlement of the Accounts of Silas C. Hall, as Administrator, etc., of Sophia Hall, Deceased, Respondent, Lydia S. Halleck, Appellant.—Decree of the

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Surrogate's Court of Cattaraugus county affirmed, with costs. All concurred.
 State Bank of Randolph, Respondent, v. Joseph C. Erb and Cressie H. Erb, Appellants.—Judgment affirmed, with costs. All concurred.
 Smith Sanborn, Appellant, v. The New York Central and Hudson River Railroad Company, Respondent.—Judgment affirmed, with costs. All concurred.
 Traders' National Bank, Respondent, v. Victor Weinstein, Defendant; Anna E. Weinstein, Appellant.—Judgment affirmed, with costs. All concurred, except Follett, J., not sitting.

Rose Williams, Respondent, v. City of Oswego, Appellant.—Judgment and order affirmed, with costs. All concurred.
 Edward R. C. Clarkson and Others, Appellants, v. The Western Assurance Company, Respondent.—Order affirmed, without costs to either party. All concurred.
 Frank Hamilton, Respondent, v. Edward B. Judson, Jr., and W. Judson Smith, as Receivers of the Syracuse Street Railroad Company, Appellants.—Judgment and order affirmed, with costs. All concurred, except Follett, J., not sitting.

FIRST DEPARTMENT, AUGUST TERM, 1897.

William W. Averell, Respondent, v. Amzi L. Barber and Others, Appellants.—Order modified as directed in opinion and as modified affirmed, without costs.—Appeal from order denying motion to reissue amendments.—

PER CURIAM: The order should be modified by inserting in the proper place in the proceedings before the referee of March 18, 1895, the following questions and answers: "Q. Were they laid under either of the original patents? A. No, sir. Q. Were they laid under either of the re-issued patents? A. No, sir," and by inserting in the case in the proceedings had on the 5th of December, 1895, the following: "Q. Were they laid under either of the re-issued patents? A. No, sir." By Mr. Hassett: "Q. Do you wish to make any change in your answer to that question? A. I do; I wish to strike out the answer, 'No, sir,' and to say that they were laid under one of the re-issued patents." The order as thus modified should be affirmed, without costs to either party. Present—Patterson, Rumsey, Williams, O'Brien and Parker, JJ.

Henry A. Landgraaf, Respondent, v. Charles H. Nicoll, Appellant, Impleaded with Others.—Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs.—Appeal from order denying motion to vacate and set aside execution and judgment.—

PER CURIAM: The order must be reversed on the ground that there is no proof of any authority on the part of the attorneys for the Lloyds Company to represent the defendant Charles H. Nicoll, or to bind him by any contract of insurance. The order should be reversed, with ten dollars costs and disbursements, and the motion granted with ten dollars costs. Present—Patterson, Rumsey, Williams, O'Brien and Parker, JJ.

In the Matter of the General Assignment of The United Press for the Benefit of Creditors to Frederick G. Mason.—Order affirmed, with ten dollars costs and disbursements.—Appeal from order extending assignee's time to file schedule.—

PER CURIAM: The order appealed from should be affirmed. The application was by way of order to show cause, and that order to show cause was not based upon any affidavit showing that the applicant was a creditor or had any interest in the estate or in making the motion. The application was based alone upon the petition of the assignee and the order made therein extending his time to file his schedule. It did not appear that the applicant had any standing in court to make the motion. The order should be affirmed, with ten dollars costs and disbursements. Present—Patterson, Rumsey, Williams, O'Brien and Parker, JJ.

The State Trust Company, as Trustee, v. Casino Company and Others.—Proceedings stayed without security until the first motion day of the October term.—Motion for stay.—PER CURIAM: If the sale of this property is stayed until Justice Stiner has fixed the amount necessary to be paid for redemption and until the receiver shall have an opportunity to pay that amount, the rights of all parties will be preserved. To that end the proceedings are stayed without security until the first motion day of the October term. Present—Patterson, Rumsey, Williams, O'Brien and Parker, JJ.

Edward V. Burton v. Frank E. Linn.—Motion granted, with ten dollars costs.

E. Bajardo v. The Mayor.—Motion denied, with ten dollars costs.

Annie M. Costello, Respondent, v. Sarah A. Waters, Appellant.—Order modified by striking out the first and third particulars, and the last six words of the fifth particular, and as thus modified affirmed, without costs. No opinion.

Charles Elisch v. The Mayor, Aldermen and Commonalty of the City of New York.—Motion denied, with ten dollars costs.

Mary Evans v. John R. Farrar, Impleaded.—Motion denied.

Giacinto Gatto v. The Mayor, Aldermen and Commonalty of the City of New York.—Motion denied, with ten dollars costs.

Giacinto Gatto, Respondent, v. The Mayor, Aldermen and Commonalty of the City of New York, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion.

Gibson Electric Company v. Liverpool, London and Globe Insurance Company.—Motion denied on payment of ten dollars costs and on the stipulation made by the defendant company's attorneys, which stipulation is to be filed with the clerk of this court.

J. J. Higgins v. The Mayor, Aldermen and Commonalty of the City of New York.—Motion denied, with ten dollars costs.

Richard Duncon Harris v. George Elliott and George L. Elliott, Executors, and Others.—Motion denied, with ten dollars costs.

Edward B. Jones and William Ireland, Appellants, v. American Grocery Company, Respondent.—Order affirmed, with ten dollars costs and disbursements. No opinion.

Bernard Kreizer v. Benjamin Benzecry.—Motion granted, with ten dollars costs.

Philip Keiber v. The Mayor, Aldermen and Commonalty of the City of New York.—Motion denied, with ten dollars costs.

Aaron Kahn v. Antoinette L. Schermerhorn.—Motion denied, with ten dollars costs.

Louis Martin, Respondent, v. The Mayor, Aldermen and Commonalty of the City of New York, Appellant.—Motion denied, with ten dollars costs.

- John Mitchell v. The Mayor, Aldermen and Commonalty of the City of New York.—Motion denied, with ten dollars costs.
- Michael Muller v. The Mayor, Aldermen and Commonalty of the City of New York.—Motion denied, with ten dollars costs.
- Annie Mitchell v. Levi C. Weir, as President of Adams Express Company.—Motion denied, with ten dollars costs.
- In the Matter of Acquiring Title by the Mayor, Aldermen and Commonalty of the City of New York, to Certain Lands on Chambers, Centre and Reade Streets, etc.—Order affirmed, with ten dollars costs and disbursements. No opinion.
- Louis Martin, Respondent, v. The Mayor, Aldermen and Commonalty of the City of New York, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion.
- In the Matter of the Mayor, Aldermen and Commonalty of the City of New York.—Motion for reference granted.
- Norberth Pfeffer v. Philip Kling et al.—Motion denied.
- Albert Peiser v. The Mayor, Aldermen and Commonalty of the City of New York.—Motion denied, with ten dollars costs.
- Henry Pundt v. The Mayor, Aldermen and Commonalty of the City of New York.—Motion denied, with ten dollars costs.
- The People of the State of New York ex rel. P. J. Mahoney v. Ashbel P. Fitch, as Comptroller.—Motion denied, with ten dollars costs.
- The People of the State of New York ex rel. J. J. Higgins v. Ashbel P. Fitch, as Comptroller.—Motion denied, with ten dollars costs.
- The People of the State of New York ex rel. B. Stanbach v. Ashbel P. Fitch, as Comptroller.—Motion denied, with ten dollars costs.
- The People of the State of New York ex rel. Albert Peiser v. Ashbel P. Fitch, as Comptroller.—Motion denied, with ten dollars costs.
- The People of the State of New York ex rel. Giacinto Gatto v. Ashbel P. Fitch, as Comptroller.—Motion denied, with ten dollars costs.
- The People of the State of New York ex rel. E. Bajardo v. Ashbel P. Fitch, as Comptroller.—Motion denied, with ten dollars costs.
- The People of the State of New York ex rel. Henry Pundt v. Ashbel P. Fitch, as Comptroller.—Motion denied, with ten dollars costs.
- The People of the State of New York ex rel. Louis Martin v. Ashbel P. Fitch, as Comptroller.—Motion denied, with ten dollars costs.
- The People of the State of New York ex rel. Charles Elisch v. Ashbel P. Fitch, as Comptroller.—Motion denied, with ten dollars costs.
- The People of the State of New York ex rel. Jacob Schalek v. Ashbel P. Fitch, as Comptroller.—Motion denied, with ten dollars costs.
- The People of the State of New York ex rel. Michael Muller v. Ashbel P. Fitch, as Comptroller.—Motion denied, with ten dollars costs.
- The People of the State of New York ex rel. John Mitchell v. Ashbel P. Fitch, as Comptroller.—Motion denied, with ten dollars costs.
- The People of the State of New York ex rel. Philip Keiber v. Ashbel P. Fitch, as Comptroller.—Motion denied, with ten dollars costs.
- James Ruddick, Respondent, v. Third Avenue Railroad Company, Appellant.—Motion granted, with ten dollars costs.
- Sarah Roche, Respondent, v. Supreme Lodge, Knights of Honor.—Order affirmed, with ten dollars costs and disbursements. No opinion.
- B. Stanbach v. The Mayor, Aldermen and Commonalty of the City of New York.—Motion denied, with ten dollars costs.
- Jacob Schalek v. The Mayor, Aldermen and Commonalty of the City of New York.—Motion denied, with ten dollars costs.
- Annie E. Smith v. Edward R. Poerschke.—Motion denied on payment of ten dollars costs.
- Frederick Sturz v. Frederick S. Fischer.—Motion granted, with ten dollars costs.
- State Trust Company, as Trustee, v. Casino Company and Others.—Motion to dismiss appeal denied, with ten dollars costs.
- B. Stanbach, Respondent, v. The Mayor, Aldermen and Commonalty of the City of New York, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion.
- Pauline Sperling v. Adolf Boll et al.—Motion granted, with ten dollars costs.
- Tradesmen's National Bank of New York v. Robert A. Tucker.—Motion granted, with ten dollars costs.
- Robert A. Tucker v. Tradesmen's National Bank of New York.—Motion granted, with ten dollars costs.
- Edward H. Van Ingen v. Henry G. Hilton.—Motion granted, with ten dollars costs.
- William H. Wright v. Rebecca Weisel.—Motion denied.

THIRD DEPARTMENT, SEPTEMBER TERM, 1897.

Davis Provision Company, Respondent, v. Fowler Brothers, Limited, and Anglo-American Provision Company, Appellants. No. 1.—Judgment against Anglo-American Provision Company affirmed, judgment against both defendants modified by deducting \$1,574.93 therefrom, with the interest and extra allowance of costs thereon, and as modified, affirmed, without costs of appeal in either case.—Appeal by defendants from a judgment entered in Clinton county upon the report of a referee against both defendants for \$7,802.44 damages, besides costs, and against the Anglo-American Provision Company for \$612.02. The action was brought to recover damages sustained by the plaintiff upon meats purchased by the plaintiff of

the defendants from 1886 to 1892, both years inclusive, the plaintiff alleging that it ordered meats of good quality, amounting in the aggregate to several millions of dollars, and that the defendants many times delivered to it meats of bad quality which it accepted upon the defendants' promise to pay or allow or credit to plaintiff whatever loss it sustained thereby, but which they finally refused to do. Plaintiff also claimed to recover upon some other specified items which are mentioned in the opinion, incidentally accruing in the course of the business. The plaintiff in its complaint alleged that the directors and managers of the defendants composed a majority of the directors of the plaintiff until 1893, and that such majority dictated

certain so-called settlements between the plaintiff and the defendants which were unjust to the plaintiff, and plaintiff asked that the same, if necessary, be set aside and that a true account be taken. The defendants denied the causes of action set forth in the complaint, and alleged that all of the plaintiff's claims had been adjusted and settled by and between the parties, and satisfied; and asserted upon the trial that the goods were bought by plaintiff upon Chicago inspection, and that that showed that the goods were of good quality when delivered there. The referee found that there had been no valid settlement, and that the plaintiff was entitled to recover upon fourteen several claims set forth in its bill of particulars.

LONDON, J.: The plaintiff is a corporation organized in 1886, under the laws of the State of Illinois, to deal in meats, provisions and grain in Chicago, Illinois, and in New York State and elsewhere. It complied with sections 15 and 16 of the General Corporation Law of this State (Chap. 887, Laws of 1892), authorizing it to do business in this State, and to sue and be sued. The defendant, the Anglo-American Company, is also a corporation, formed prior to 1886, under the laws of the State of Illinois, and at the time of the organization of the plaintiff was extensively engaged in the meat and provision business in the city of Chicago. It had also an office in the city of New York, and a warehouse at Weehawken, N. J. Robert D. Fowler and Anderson Fowler were the principal stockholders of the company, and with one Robert Stobo, were its directors. Stobo was secretary, and owned one share of stock. Henry Davis was an expert salesman. The Fowlers were desirous of securing his services, and through him increasing their trade in the east, based upon a larger capital than Davis possessed. Hence, the plaintiff was organized mainly for the purpose of selling the meats of the Anglo-American Provision Company to traders in the State of New York and at other eastern points. Davis and the two Fowlers were at first the sole stockholders and directors of the plaintiff, Davis holding one-third of the capital stock, and the two Fowlers two-thirds. Henry Davis was the president of the plaintiff and manager of its business. He had no interest in the Anglo-American Company. The plaintiff, under the credit which the Anglo-American Company extended to it, entered at once upon a large trade in the various kinds of meats produced by the latter company, and continued it from 1886 to December 3, 1892, when the trade between the parties ceased. It commenced its business in Albany, had a branch at Plattsburg, and afterwards transferred the business to New York city. The plaintiff ordered of the Anglo-American Company whatever meats it wanted, usually directing that they be sent direct from Chicago to the plaintiff's customers, which was done, the plaintiff in such cases receiving the invoices, and crediting the Anglo-American Company with the amount as stated therein, and the plaintiff collecting from its customers. Some meats, however, were sent directly to the plaintiff at its various places of business and to the cold storage houses in Weehawken, N. J., subject to plaintiff's order. The Anglo-American Company rendered monthly statements to the plaintiff and drew drafts from time to time upon the plaintiff, usually upon the general account. These drafts the plaintiff honored. As a general rule, and until near the close of their active trade with each other, the plaintiff was usually in debt to the Anglo-American Company from \$40,000

to \$100,000. Robert Fowler was the president and manager of the Anglo-American Company until his death in 1889, when Anderson Fowler succeeded him as president and manager, and Robert Stobo, the secretary of the Anglo-American Company, succeeded him as director of the plaintiff. Stobo acted in the interest of Anderson Fowler. The defendant, the Fowler Brothers (Limited), was organized September, 1890, under the laws of Great Britain, to take over to itself the business of the Anglo-American Provision Company, and of the other like corporations and companies named in its charter. It took over to itself the Anglo-American Provision Company, its capital stock, business and liabilities. It kept the latter company alive and used its name in most of its business with plaintiff. The Fowler Company (Limited), upon its acquisition of the Anglo-American Provision Company, thus became the real party in interest in the business thereafter done with the plaintiff, although the name of the Anglo-American Company was often used. Mr. Anderson Fowler was the representative of both defendants, and as the transactions to which we need to refer were often had with him without specifying which defendant he represented, we shall find it convenient often to use the word "defendant" without specifying which one. Except when the proceedings of the board of directors of the plaintiff are in question, the evidence requires us to assume that Henry Davis alone represented the plaintiff, and Anderson Fowler, after the death of his brother Robert in 1889, represented both defendants. Some of the plaintiff's claims arose during Robert Fowler's lifetime, and in respect to them he represented the Anglo-American Provision Company. This case was tried, together with two others involving alleged causes of action growing out of the same transactions and involving the same defenses. We shall separately examine the various causes of action, but what we say in this case in reference to the various defenses will apply to the two other cases. 1. As to the causes of action in this case. The defendants in their brief, apart from their general defenses of settlements, and that the goods were purchased upon Chicago inspection, contest eight of the fourteen items allowed by the referee, as not established by the evidence, thus apparently leaving six items, amounting, without interest, to \$2,274.13, to be tested by the other defenses. The first item contested upon its merits is for inspecting and cooping in 1888 803 tierces of hams and shoulders, \$401.50. These tierces were sent by defendant, the Anglo-American Company, to the plaintiff, and stored in a warehouse at Weehawken. The plaintiff's evidence is to the effect that these goods arrived there in bad condition and hence this work was necessary; that Robert Fowler had told him that all goods coming to Weehawken in bad condition should be made good by the defendants; that when these goods arrived Davis told Robert Fowler about their bad condition, and Fowler told him to have one Noble attend to them, pay Noble his charges and that the defendants would repay him. Davis employed Noble; he inspected and re-cooped them, rendered his bill and plaintiff paid it. No question is made about the price. The difficulty about this item is that Davis at first seemed to be confused in his recollection, but afterwards stated that the conversation was with Robert. We do not see any ground for reversing the finding of the referee. 2. The next item is \$100.56 on salted Christmas goods, being 20 crates of hams, 10,066 pounds, ordered for the Christmas

trade, but which did not arrive until that trade was over, and upon which the referee allowed the plaintiff one cent per pound, being the amount of the fall in the market price upon the close of the Christmas trade. I see nothing unreasonable in this. 3. The item of \$60.84 for 1,040 pounds of shrinkage in hams invoiced at 50,000 pounds, I do not think was established. It seems to be plainly due to the careful scraping and treatment they received after their arrival in order to put them in an extra nice condition, and not at all due to shortage in the invoiced weight. The claim should have been disallowed. 4. The next item challenged is for \$497.25, claimed on 75 tierces of shoulders which defendant, upon plaintiff's direction, sent to plaintiff's customer, Hammond, at Syracuse, which Hammond rejected as bad, and forwarded to plaintiff at New York. In a record like this, containing upwards of 2,100 folios, and involving many separate items, the court must trace any one item by examining the folios cited by the respective counsel. We have done so, and do not find the evidence that these shoulders were bad. The defendant cites us to evidence tending to show that the plaintiff never paid the defendant for these goods. We are cited to no explanation of this evidence. We think the referee should have disallowed the item. 5. Plaintiff claims \$2,047.40, being loss upon 300 tierces of hams, parcel of 975 tierces, which plaintiff ordered in November, 1890, for January delivery, that is, delivery to such customers or to plaintiff as plaintiff should specify. In March, 1891, of the whole order, 550 tierces remained with the defendant at Chicago awaiting plaintiff's directions for delivery. March 24, 1891, Fowler telegraphed to Davis, "Shall we ship all your product promptly. Weehawken. We are short of room." To which Davis answered on the same date, "Confined to room. Expect be at office to-morrow. Will send list of stuff by wire. Will not do to ship all to Weehawken as have some distributions other points." March twenty-fifth, Fowler to Davis, "Compelled to ship for want of room. Inman drawn against Tunnel stock. The 7,500 shares not arrived. Shall I pay draft?" Davis to Fowler, same date, "Yes. Honor Inman's draft. Am mailing you 7,500 shares." Same date, Fowler to plaintiff, "Shipped 250 tierces; sixteens 300 twelves, average hams, Weehawken. May we ship everything remaining there? Remit." March twenty-sixth, Davis to Fowler, "Ship one car S. P. hams, 16 average via Lackawanna, our order, Elmira, Pickle off. Cannot afford to have everything go to Weehawken, cause double expense." March twenty-sixth, Davis wrote to Fowler, "Do not ship all hams to New York as we prefer to have them kept in Chicago, owing to bad results on previous stuff stored there. Also, a difference in the freight, which is a consideration." But this letter, probably, was not received in Chicago before March twenty-seventh, when Fowler telegraphed to Davis, "Sixteen, average, hams, all Weehawken. Cannot change arrangements. Must have remittance and room, as arranged New York." The shipment of 550 tierces to plaintiff at Weehawken for defendant's convenience, without awaiting plaintiff's orders as to customers, the plaintiff complained of to the defendant, and insisted that the defendant should bear the loss to result from it. The plaintiff disposed of 250 tierces without loss. Davis and Fowler, Davis testified, met in Albany, N. Y., in April, while the 300 tierces were yet in the storehouse at Weehawken, and told him he could not accept them, and that it was there agreed between them that Davis should dis-

pose of them as best he could and make a statement of the loss and defendant would adjust and pay it. The plaintiff did dispose of 240 of the tierces at a loss and gave testimony to the effect that 60 tierces were so bad that he could not dispose of them, and that they were a total loss. The plaintiff made a statement of the loss, repeatedly exhibited it to the defendant, but defendant never allowed it. The plaintiff claims he never received the warehouse receipts for the 60 tierces. The defendant contradicts this. The referee finds with the plaintiff. It is plain that the plaintiff bought a large invoice of goods for January shipment, and that in March following it had not given defendant any order for shipping this parcel of them, and that the defendant acting for its own convenience forwarded the goods to plaintiff without further awaiting plaintiff's orders. The plaintiff was thus threatened with a loss, and complained to the defendant. The plaintiff was at fault in leaving the goods with defendant so long, and the defendant was too peremptory in forwarding the goods without giving the plaintiff sufficient notice to enable it the better to protect itself. It was thus a case for compromise, and I think the parties did agree that plaintiff should dispose of the goods, and that the defendant should stand the loss, if any. There does not seem to be much question about the amount of the loss. The referee's allowance should be sustained. 6. Claim of \$999.93 for damages allowed by the referee at \$625, on 175 tierces of hams in 1891. The defendants show, I think quite clearly, that the bill of particulars claiming \$999.93 omits a credit for \$406.80 upon account of 16 tierces of smoked hams, which credit plaintiff gives defendant. The balance there charged is the same as shown in plaintiff's ledger, and there is a mistake of 16 tierces in the footing in the bill of particulars. The claim is that the meats were defective in quality, and plaintiff, therefore, had to sustain a loss upon them which defendant promised to pay. The items of the loss seem to be taken from plaintiff's books upon general testimony that the entries thereof were known to be true when made. Relying upon such entries, the claim should be reduced \$31.57. 7. The claim of \$925 for interest, February 2, 1890. Defendant paid Armour & Co. \$6,390.95, at the request of plaintiff, and charged plaintiff with it. Plaintiff paid the defendant the amount as charged, with other items, but afterwards on April 30, 1890, defendant credited plaintiff \$48,211.03 upon account of goods charged to plaintiff but not sent, and by mistake included the \$6,390.95 as goods charged but not sent, and did not discover the mistake until July 28, 1891, two years and three months after the credit was given. The defendant then charged the amount back to plaintiff, with \$925 interest upon it. Plaintiff's bookkeeper discovered the mistake about the time the credit was made, and made a pencil entry in plaintiff's books indicating it. The effect of the transaction was that for two years and three months plaintiff had the benefit of a credit of \$6,390.95 to which it was not entitled, and the defendant's drafts upon it were so much less. Plaintiff protested against the charge for interest. The course of business between the parties was for plaintiff to pay the amounts charged against it by defendant, and to charge back its demands for errors, and thus this item of interest stood charged to plaintiff as part of its debit to defendant, against which defendant drew, and plaintiff paid the drafts. The credit of the \$6,390.95 was not a case of money paid by mistake,

but of money remaining uncollected for two years and three months by mistake of the defendant, in which the plaintiff suffered the defendant to rest. But plaintiff did pay the interest when charged with it, not by mistake, but under protest made by letter. The burden rests upon the plaintiff to show that in good conscience the defendant ought not to retain this interest, and we incline to the opinion that, under all the circumstances, it has failed to do so. The plaintiff does not come into court with hands entirely clean in respect to this item. The referee does not fully state the facts, but there does not appear to be any dispute about them. I think the claim should not have been allowed. 8. The allowance of \$60 for damages upon a single lot of number 8 corn bought by the defendant for plaintiff, as its agent, is also disallowed. This was outside the usual course of business between the parties. Defendant bought it according to the rules of the Chicago board of trade, and simply charged a commission of \$15 upon it, and offered, if plaintiff would send it samples and affidavits, to recover plaintiff's damages from the vendor. It is true the defendant invoiced the corn as if it were the vendor, but the evidence showed that it was merely plaintiff's purchasing agent. The aggregate of the items disallowed is \$1,574.96, to which interest is added in the judgment. The claim of the defendant that the meats were purchased upon Chicago inspection we do not sustain, for reasons which it will be easier to present in connection with the alleged settlement between the parties June 24, 1891, at a meeting of the plaintiff's directors, now about to be considered. The defendants claim that all the demands of the plaintiff were settled by the parties and as settled satisfied. These alleged settlements were: 1. By the board of directors of the plaintiff, Davis participating, June 23, 24, 1891. 2. March 11, 1892, by Davis and Anderson Fowler, when Davis gave plaintiff's note to Fowler for defendant for \$27,102 21, which note was renewed by plaintiff by two notes, one dated June 25, 1892, the other June 27, 1892, each for \$13,551.11, which plaintiff paid at maturity. 3. By Davis and Anderson Fowler, December 9, 1892, when Davis gave three notes of plaintiff to Fowler for defendant aggregating \$23,546.67. 4. By judgment obtained upon the December notes. The importance attached by the defendant to the so-called proceedings of the plaintiff's board of directors June 24, 1891, leads us to examine respecting them, not only with respect to this action but with respect to the other two actions. The defendant claims that, at that meeting, all past differences were settled, and an adjustment made of the terms of the future dealings of the parties with each other. On the 23d and 24th days of June, 1891, Henry Davis, Anderson Fowler and Robert Stobo, the three persons composing plaintiff's board of directors, did meet together in Chicago. Fowler and Stobo were also directors of the Anglo Company, and Fowler was manager of both defendants. The plaintiff denies that the meeting was of plaintiff's board and alleges that it was merely a conference between Davis as plaintiff's manager and Fowler and Stobo in behalf of the Anglo Company, and he denies that plaintiff's claims were settled, and he challenges the verity of the record, and charges that it is a subsequent fabrication. In 1893 the plaintiff's board was changed by electing Mr. Weed in the interest of Mr. Davis as a director in the place of Mr. Fowler, and in December, 1893, the board "reconsidered, rescinded and annulled" the resolutions hereinafter marked

A and B, charging that they were a fraud upon the plaintiff. The minutes of the meeting of June 24, 1891, were made at the time in a pencil draft by Mr. Stobo, the secretary of plaintiff's board, and afterwards with the addition of formal parts entered in the book of minutes of the proceedings of plaintiff's board. After reciting time, place and directors present, the minutes recite: "This meeting was called for the purpose of adjusting the accounts between the Davis Provision Co., and the Anglo-American Provision Company." It thus appears that it was a meeting of the representatives of each company, although entered in plaintiff's book as a meeting of its board. The minutes proceed: " * * * After considerable discussion regarding the accounts and explanations of the same from Mr. Davis, it was found that it was impossible to come to an understanding this afternoon, and this meeting was on motion adjourned to Wednesday, the 24th inst, at 1:30 o'clock p. m. at the same place." The minutes recite that the same directors met the next day pursuant to adjournment, and that A. "Mr. Fowler moved that the claims by the Davis Provision Company on the Anglo-American Provision Company for allowances on old mess pork should be abandoned, seeing that it was purchased as contract pork and was shipped just as received. Mr. Stobo seconded the motion. Mr. Davis stated that he * * * had bought the Anglo brand of pork. Mr. Fowler said that was a mistake, as Mr. Davis had bought contract pork only and not the Anglo brand. The motion being put was carried, Mr. Davis dissenting." B. "After consideration and discussion on the subject of the accounts and claims, it was, Agreed, that the claims up to this date are settled by the Anglo-American Provision Company allowing the Davis Provision Company \$1,408.70. The Davis Provision Company sells to the Anglo-American Provision Company the 45 tierces rib bellies now in Chicago at 5½ cents per pound. The Davis Provision Company gives their acceptance to the Anglo-American Provision Company for the balance now due at thirty, sixty and ninety days, in equal proportions." Assuming the truth of the record, the representatives of the two companies agreed to these propositions. The acceptances, however, were not given by the plaintiff, but defendant continued to render accounts as before. The following entries were not "reconsidered, rescinded or annulled" at any subsequent meeting: "In regard to future business between the Davis Provision Company and the Anglo-American Provision Company, the arrangement is as follows: 'The Davis Provision Company get one per cent from this date on all goods purchased by them from the Anglo-American Provision Company, or sold by them for the Anglo-American Provision Company, and to avoid further claims and controversies it has been' 'Agreed, that all goods are to be inspected at the time of delivery, and that inspection is to be final. The Anglo-American Provision Company agree to carry goods for the Davis Provision Company, and when the goods are ordered shipped, a draft at thirty days to be made for the amount of invoices, with carrying charges.' Mr. Fowler moved that with reference to the meeting of 14th April, 1890, the action therein having been consummated, and Mr. Davis having continued to draw his salary of \$5,000 per annum, as formerly, it is Resolved, that Mr. Davis' salary of \$5,000 be confirmed and continued until further arrangements. This motion on being put to the meeting was carried unanimously. * * * On motion, duly carried, a semi-annual dividend of five per cent is

declared on the capital stock of the Davis Provision Company, to be paid on the 15th day of July next. Without herein setting forth at length the evidence we believe the minutes state with substantial truth the result of the conference between the three persons present. With respect to the resolutions confirming Mr. Davis' salary at \$5,000 per year, and declaring the semi-annual dividend of five per cent upon the plaintiff's capital stock, to neither of which the plaintiff objects, the minutes show the action of the plaintiff's board. In other respects the minutes on their face purport to show the transactions between the manager of the plaintiff and the managers of the Anglo Company. The proposition of course cannot be admitted that Fowler and Stobo, while professedly acting in the interest of the Anglo Company upon matters of difference between the two companies, could by their votes in the interest of the Anglo Company dispose of or control the opposing interest of the plaintiff against the will of Davis, who alone in these matters was representing and defending it. When two companies are acting at arm's length, each one acts only through its real champions, whatever the disparity between the number of persons on the respective sides. If we assume it to be in strictness a meeting of the plaintiff's board, then the agreements set forth between the plaintiff and the Anglo Company lack the element of mutuality necessary to their validity. Neither company could by its *ex parte* action bind the other, and in that case the statements of agreements were only propositions invalid until accepted by the other company, and such acceptance not having been formally made by the Anglo Company, can only be inferred from such subsequent action of both companies as would indicate that the proposition was kept open by the plaintiff until finally acted upon by the defendant and thus accepted. These statements, therefore, are evidence of an agreement only in case they are construed as the acts of the two companies, or as a proposition of the plaintiff kept open until such action of the Anglo Company as shows its acceptance. And, although the representatives of the two companies may then have agreed upon the terms of the settlement of their past differences, and upon the terms of their future dealings, either party could recede from such settlement with the assent of the other, and such assent, if given and acted upon, would constitute a substituted agreement. Davis testified that all of the plaintiff's claims were not settled at the Chicago meeting, but only those for which the sum of \$1,803.70 was allowed, \$1,250 of which was upon account of meats sold to plaintiff after having been damaged by fire, and the balance upon account of sundry, small, unremembered items; that the balance of the accounts that were not settled there was left open for future settlement. The plaintiff's claims against the defendant as they now appear in its bills of particulars in the three actions amounted at that date to several thousand dollars, although of course the bills of particulars are not to be taken for more than their value as such. The plaintiff kept insisting upon its claims until it obtained from defendant a concession of their possible merits, and thus the claims were restored to their merits, except those embraced in the allowance of \$1,803.70, for which no claim is herein made. With reference to the Chicago inspection—August 26, 1891, two months after the directors' meeting, the Anglo-American Provision Company wrote the plaintiff as follows:

"Yours of 18th received complaining of 73 tierces Minnesota hams. We are sorry to inform you that we cannot do anything for you in the matter, as our understanding with your Mr. Davis was that you should have inspector here, who would inspect all your goods before leaving house. Not having done so you take the goods at your own risk. Mr. Fowler will be in New York this week, and will no doubt see your Mr. Davis." Mr. Davis testified that he did see Mr. Fowler a few days later, and told him that "we could not accept any inspector at Chicago; that no matter what instructions he got, we must receive goods shipped to our customers in good condition, and they would accept them only when they were good; that no customers would ever accept such kind of meat. We never kept an inspector at Chicago at all." It is proper to state that Davis testifies that he never saw these minutes or heard them read until 1893, after the trading relations between the parties were closed, and denied that this agreement was ever proposed or adopted. In this respect, however, Mr. Stobo contradicts him. The evidence, I think, shows that although Davis and Fowler often wrangled over the question of the Chicago inspection, Davis never yielded in his refusal to submit to it, and that Fowler, although he did not yield the point as an entirety, did so in several cases as they arose, and by his letter of June 7, 1892, hereinafter set forth, did so as to all cases which could be shown to have merit. Mr. Davis testifies that the original understanding, which was never changed, was that defendant would furnish plaintiff "with good goods, and the best of goods." The evidence shows that if the meats left Chicago in good condition they would, in the usual course of transportation, reach their destination in that condition, when they ought to be examined, and if found, as they might be found, to need special treatment, they should of course receive it. The reasons urged by the plaintiff why it should not be bound by the Chicago inspection are cogent. The plaintiff was a provision company, and bought its meats of defendant as provisions, and not for any less important purpose. In the absence of a different understanding the law would imply the contract that the provisions should be wholesome and merchantable. (*People v. Parker*, 38 N. Y. 85.) The success of the plaintiff's business depended upon the quality of the meats. The defendant undoubtedly extended to the plaintiff unusual credit, and in the main furnished it with good meats. It is not surprising in so large a business, involving skill in treatment, condition of the animals slaughtered, long distances of transportation, that occasional losses should arise. The plaintiff's situation made it dependent, in a large degree, upon the defendant. In paying defendant's bills as rendered, the plaintiff was exposed to great risk unless it could depend upon defendant's fairness in indemnifying it against loss caused by defendant's sending it damaged goods. Whatever may have been the attitude of the parties to each other in respect to other demands or charges, we think that the referee was justified in finding that the plaintiff did not agree to be bound by the Chicago inspection, but was entitled to good meats, and that when the defendant sent defective meats instead, it became liable for the consequent damages, and that this liability was not extinguished by plaintiff's payment of defendant's bills as rendered in case the plaintiff made seasonable demand for the damages. This brings us to the alleged settlement of March 11, 1892, when plaintiff

gave defendant a note of \$27,102.21. At that time the plaintiff was apparently owing the defendant upwards of \$20,000, over and above all plaintiff's claims, good or bad, and the defendant wanted the money or plaintiff's note, and insisted upon having one or the other. Davis insisted upon the plaintiff's claims. There is no doubt from the evidence that Fowler was impatient about these claims, regarding some of them at least as frivolous, and others, such as Davis in view of Fowler's interest and position in the plaintiff, and the way the defendant was extending credit to it, ought not to press, but he did not want to come to an open rupture with Davis, and he postponed their adjustment. Neither did Davis wish to break with Fowler, and he too acquiesced in postponement. The defendant's account showed a balance due it as of January 30, 1892, of \$39,602.93. On this the defendant had made a payment of \$3,848.77. There was a stockyard storage item due defendant; the exact amount of it was not at hand. Charles S. Walker, defendant's clerk in its New York office, was present; it was agreed that he should get the amount of this item from Chicago; that Davis should sign the note in blank, which he then did, and that Walker should fill in the blank with the balance to result from these three items. Walker ascertained the stockyard item to be \$1,388.05, thus making the balance \$27,102.21, which sum Walker inserted in the blank in the plaintiff's note. In action No. 3, Mark Davis, as assignee of plaintiff, is granted a recovery of the amount of this stockyard item, a recovery which we do not sustain. In that interview Fowler also presented a claim of \$4,624.90 for interest on account of plaintiff's delayed payments. Davis objected to it. As a general rule the defendant did not charge plaintiff with interest. Fowler evidently presented the demand as a convenient offset against the claims made by Davis, not intending to use it otherwise. Defendant's counsel say in their brief, "After a discussion it was agreed that this interest item should be taken out for the time being and held in abeyance as against Davis' claims which he was asserting as usual." When the note fell due in May following plaintiff did not pay it. Davis was still insisting upon his claims, and he and Fowler had an interview, and thereupon Fowler wrote him as follows:

"NEW YORK, June 7, 1892.

"HENRY DAVIS, Esq.,

"President Davis Provision Company,
New York:

"DEAR SIR.—In reference to our interview to-day I wish to state that every claim of the Davis Provision Company on the Anglo-American Provision Company shall be taken up, carefully considered, and if it is shown to have any merit the claim shall be carefully adjusted.

"Yours truly,

"ANDERSON FOWLER,

"President Anglo-American Provision Co.,
Chicago."

The plaintiff renewed the note of March 11, 1892, by giving two notes, one June 25, 1892, and one June 27, 1892, each for \$13,551.11, which plaintiff paid upon their maturity respectively, in September and October following. In this statement I adopt the facts as stated by defendants. It is plain from these facts that plaintiff's claims were not settled by these notes, but were held in abeyance. We next consider the alleged settlement of December 9, 1892. Plaintiff had been buying goods as usual. Defendant's account for mer-

chandise against plaintiff, not including the interest item held in abeyance, called for a balance of \$30,705.11. This balance was reduced \$7,158.74 by credits allowed the plaintiff, making it \$23,546.37, for which the plaintiff gave the defendant three notes, some further history of which will appear when we treat of the judgment obtained against the plaintiff. These credits were not upon account of plaintiff's "chronic" claims. One item of it, \$5,071, was upon account of bad hams sent to plaintiff, and charged against it, but returned in October, 1892. An item of \$1,663.70 was for extra freight charges which plaintiff claimed had been incurred because the defendant had shipped goods by rail instead of by lake as plaintiff had directed; the final allowance of this claim was reserved for further consideration, but it does not appear that the credit was ever revoked. Another item of \$146 had been included in the June notes; the other items of the credit were for storage, insurance, inspection charges, and \$7.00 to correct an error. Unless we are to assume that the chronic claims were satisfied by Fowler's withdrawal of his interest charge which he presented in March previous, they still remained in abeyance. The referee has found upon conflicting evidence that the claims were not settled or prejudiced by giving the notes, for the reason that they were then expressly reserved from prejudice and for future consideration and adjustment. Anderson Fowler was asked why he did not take a receipt when the notes were given, and answered, "Up to a certain period we considered that account largely under the control of my brother and myself, because we were directors in the Davis Provision Company." Referring to some notes previously given he testified, "We made him do it." Without going into the mass of details, we think the conclusion of the referee in this respect is sufficiently supported by the evidence. With respect to the judgment—the notes given by plaintiff in December, 1892, were not paid when due, and defendant sued the plaintiff upon them. The plaintiff set up these claims in its answer. Through inadvertence its attorneys omitted to procure the judge's order directing the issues to be tried, as required by section 1778 of the Code, the action being against a corporation upon a promissory note, and, therefore, when the case came on for trial, judgment was taken against it as upon default. Upon plaintiff's serving its notice of motion to have its default excused and opened, and its answer interposed, a stipulation was made between the parties as follows: "Motion to be denied, stay vacated, plaintiff not to issue the execution, Davis agreeing to pay the judgment in ten days and such payment to be without prejudice to any and all claims of the Davis Company." That thereupon an order was made denying the motion to vacate the judgment, and plaintiff paid it within ten days, and an order was thereupon entered vacating the judgment and discontinuing the action. This was in October, 1893, after the parties had ceased to trade with each other, and after the other alleged settlements. Of course, under the stipulation as acted upon, the claims were not prejudiced by the judgment thus vacated upon payment. Some exceptions are pressed upon our attention. Davis employed Bergetheil, an accountant, who compiled from plaintiff's books one statement of plaintiff's claims in 1892 and another in 1893, and Davis delivered each of these statements to Fowler, who examined them in person, and by defendant's clerks, and compared them with defendant's books, and quarrelled with Davis about them and never

allowed them. They were part and parcel of the long-standing controversy. Standing alone they would be incompetent, as plaintiff's declarations. Standing as they did as the focus of contest, they showed what the contest was about, and served to explain the declarations of both parties. The worst that can be said of them is, that when all the declarations of the parties over them were considered, they did not advance the plaintiff's case. We do not think their admission under the circumstances constitutes reversible error. Davis was permitted to testify to the arrangement made between him and the Fowlers preliminary to the organization of the plaintiff corporation, and that among the terms proposed by the Fowlers and accepted and relied upon by Davis, was this: "They further said they would give me good goods, and the best of goods." Undoubtedly this was considered important by the referee. It bears upon the contention of the defendants that plaintiff was bound by the Chicago inspection of the goods, whether they proved to be good or bad when they reached their eastern destination. The Fowlers were the owners and managers of the defendant, and could only carry out their proposition through the defendant, and the benefit they were seeking for themselves was through the benefit to result to both corporations through the proposed method of dealing. The proposition was not beyond their powers, and having been acted upon by the formation of the plaintiff, fair dealing required that the defendant should observe it. (*Rogers v. N. Y., etc., Land Co.*, 134 N. Y. 197, 211; *Cook on Stockholders*, § 707, p. 1043.) We think the evidence competent. The judgment is against both defendants upon the claims accruing after the formation of the defendant, Fowler Brothers (Limited). This company was formed, as its charter recites, "To acquire and to take over all or any of the following businesses," of which the business of the Anglo-American Provision Company was one. The practical construction given these powers is shown by the facts that Fowler Brothers (Limited), acquired most of the stock of the Anglo Company and its business. The business was carried on from the same offices by Anderson Fowler, manager of both companies, sometimes in the name of one company and sometimes in the name of the other. Whatever was done in the name of the Anglo Company was done by the Fowler Brothers (Limited); the business that the Fowler Brothers (Limited) thus acquired the Anglo Company could not retain, and, hence, apart from maintaining its organization, it is not perceived that the Anglo Company could do any business except to lend its name and credit and nominal instrumentality to the continuance of the business it had surrendered. The referee finds that the business with the plaintiff continued to be done in the name of the Anglo Company; this finding is supported by the evidence. We need not inquire very closely into the processes by which one corporation absorbs or "takes over" another without effacing its identity; it suffices for the purposes of this action to hold upon elementary principles the absorbing company liable for the acts of its agent, and the agent liable because it insists that it is still doing business as principal. If it is necessary to find that the two corporations acted jointly in order to support the judgment, we think the evidence would justify such a finding, since manifestly one of the purposes of such a corporate union was to promote by their co-operative or united action, the corporate business upon which the prosperity of each company depended. We do not think that

either company should escape liability, and do think that neither can complain because its liability is shared by the other. Their relations to each other can be settled by the one person who is the manager of both. The defendants objected *in limine* that the court had no jurisdiction of the subject-matter of the action, because all the parties are foreign corporations. The plaintiff and the Fowler Brothers (Limited) had severally obtained, pursuant to sections 15, 16 of the General Corporation Law (Chap. 687, Laws of 1892), the certificate of the Secretary of State authorizing each to do business within this State, and each one had a place of business within the State. The Anglo-American Provision Company also had the same office in this State as the Fowler Brothers (Limited). The plaintiff, therefore, could sue in like manner as a domestic corporation. So far as the action is upon contracts made in this State, the certificate, under section 15 of the General Corporation Law, authorized it to sue the defendants, and section 1790 of the Code of Civil Procedure confers the right. Section 1780 further subjects a foreign corporation to suit where the cause of action arose within this State, other than that affecting title to lands without the State. The complaint alleges the causes of action as arising within the State, and no issue is made by the answers in this respect. The referee finds that they did so arise. We think the objection not tenable. It follows that the separate judgment against the Anglo-American Provision Company should be affirmed; that the judgment against the two defendants should be modified by deducting therefrom the following items of principal: \$60.84 shrinkage; \$497.25, schedule D; \$31.87, from \$625 allowed upon schedule B; \$60 upon corn; \$325 upon interest paid by plaintiff; total, \$1,574.96, with the interest therein added upon such items, and as so modified, affirmed, without costs. All concurred.

Davis Provision Company, Respondent, v. Fowler Brothers (Limited), and Anglo-American Provision Company, Appellants. No. 2.—Judgment reversed, new trial granted, referee discharged, costs to abide event.—

LONDON, J.: The plaintiff claimed and has recovered a commission of one per cent upon all meats purchased by the plaintiff directly of the defendant, the Anglo-American Provision Company, during the period from July, 1889, to June 24, 1891. The parties began dealing with each other in 1886, under an agreement that the defendant, the Anglo-American Company, should allow the plaintiff this commission. Said defendant did allow it until July, 1889, and then stopped the commission until June 24, 1891, and thereafter allowed it. The defendant's contention is that in July, 1889, the allowance was stopped by the mutual agreement of the parties, in connection with an agreement that plaintiff was to be furnished goods at the lowest market prices. The question here to be considered is whether such new agreement was made. My examination leads me to the conclusion that it was made, and that the referee's finding to the contrary is against the clear weight of the evidence. Anderson Fowler and Robert Stobo testified that it was made; the defendant testified that it was not made. The written evidence, consisting of the plaintiff's entries in its ledger respecting the commissions; the so-called minutes of the proceedings of plaintiff's board of directors read in evidence by the plaintiff; the accounts rendered by the respective parties during the period in question; and the acts of the parties, show conclusively, I think, that the allowance of the

commission was stopped by the agreement of the parties during the time for which the plaintiff now claims it. (1) In action No. 1, I have referred to the meeting of the plaintiff's board of directors in Chicago, June 23, 24, 1891, at which the three directors of the plaintiff, Anderson Fowler, Robert Stobo and Henry Davis, were present. The minutes, as read in evidence, contain the following: "In regard to future business between the Davis Provision Company and the Anglo-American Provision Company the arrangement is as follows: The Davis Provision Company get one per cent. from this date on all goods purchased by them from the Anglo-American Provision Company, or sold by them for the Anglo-American Provision Company." The board of directors of plaintiff was afterwards changed so as to give Davis control instead of Fowler, and the proceedings of the board as recorded in the corporate book under date of July 24, 1891, purporting to recite a resolution and an agreement by which the claims of the plaintiff against the Anglo-American Provision Company were settled, were "reconsidered, rescinded and annulled," but the entry as quoted above was not challenged. The entry is pregnant with the suggestion that the plaintiff had not been receiving the one per cent. commission. (2) The plaintiff's bill of particulars contains the following items of commissions: July, 1889, \$123; August, 1889, \$704.09; September, 1889, \$223.85; October, 1889, \$29.01. The total of these items is \$1,081.28. The plaintiff's ledger does not contain these items, month by month, as above specified, but under date October 31, 1889, their aggregate, \$1,081.28, is charged to defendant. The bill of particulars proceeds with the following items: November, \$34.65; December, \$159.07; January, \$127.38. The plaintiff's ledger does not contain these monthly items, but their aggregate, \$321.10, charged to defendant, January 31, 1890. Thereafter, plaintiff's ledger contains monthly charges for commissions, the same as the bill of particulars, down to March 31, 1891, making a total of \$3,034.40. The defendant's books show a credit to plaintiff of \$80.12 for July (1889) brokerage. (The plaintiff was entitled to brokerage upon such sales of defendant's goods as it made as a broker.) This sum, credited, leaves a balance of \$2,954.37. Under date August 31, 1891, the plaintiff's ledger contains this credit to defendant, "Commission of \$2,954.37." Now, why were the claims for commissions for July, August, September and October, 1889, not charged upon the ledger until October 31, 1889, over three months after the alleged agreement of July, 1889, to discontinue the commissions? It looks like an afterthought. Why, in August, after the directors' meeting of July 24, 1891, did the plaintiff credit the defendant with all the commissions charged against it during the period in dispute? On January 20, 1892, the plaintiff renewed the charge against the defendant thus, "To commission, \$2,954.37." The charge enabled Mr. Davis to say to Mr. Fowler, when he presented him with an account of his claims, "These items are all on our books." (3) During the period in question the defendant did not credit the plaintiff with any commissions, and yet rendered it monthly accounts, and the plaintiff did not, during that period, claim commissions, but made the claim months after it had expired. Referring again to the directors' meeting of July 24, 1891, we observe that Fowler and Stobo, two of the three directors of the plaintiff, were acting at that meeting in this respect in the interest of the defendants, and being in the majority, controlled the action of the board, and that such

action, if prejudicial to the plaintiff, was voidable at its election, still where benefits conferred upon the plaintiff were in connection with burdens imposed and in consideration of them, the plaintiff could not accept the benefits and repudiate the burdens. Nor could the plaintiff do so if the action was an agreement. Now, the plaintiff accepted the following benefits then accorded: A credit of \$1,803.70; the sale of certain meats to defendant; the allowance of one per cent. commission from that date. Mr. Davis accepted the confirmation of his right to a salary of \$5,000 per year for the past and the future, and the semi-annual dividend of five per cent then declared. It is not unreasonable to suppose that the plaintiff and Mr. Davis, in consideration of what they obtained, understood that their then unexpressed claim for commissions was extinct, and thus the correction of their books by the credit of August 31, 1891, of the commissions charged for the disputed period. We think this claim, like Fowler's claim for interest, referred to in action No. 1, was a make weight, and fictitious. The judgment should be reversed; the referee discharged; new trial granted; costs to abide the event. All concurred.

Mark J. Davis, Respondent, v. Fowler Brothers (Limited) and Anglo-American Provision Company, Appellants.—Judgment against the Anglo-American Provision Company reduced to the items \$333.87 and \$123.50, with interest thereon as allowed in the judgment, and as modified, affirmed; judgment against both defendants reduced to \$1,280.91, with interest thereon as allowed in the judgment, with costs as allowed below, less extra allowance upon amount deducted, and as modified, affirmed.—

LONDON, J.: The claims for which the plaintiff, as assignee of the Davis Provision Company, seeks recovery, are: (1) Five claims for meats purchased in 1892, which were of bad quality upon their arrival to plaintiff's customers, to whom the defendant shipped them upon plaintiff's order. The plaintiff bought these goods of defendant, defendant to carry them until plaintiff gave orders to ship them. They were shipped as plaintiff gave the orders. Plaintiff paid defendant for them in full, pursuant to the usual course of business between the parties, and, because of their bad quality, the plaintiff sustained the losses allowed by the referee—total, \$1,280.51, to which interest was added. These claims arose after June 24, 1891, the date of the so-called meeting of the plaintiff's board of directors, of which mention is made in cases Nos. 1 and 2. I think, upon all the evidence, the judgment should be sustained as to these claims. (2) Various claims for carrying and storage of the meats sold by defendant to plaintiff, covering the period from February 24, 1890, to July 14, 1891. That is, for the storage or keeping on hand by defendant in Chicago, ready for delivery, of the meats bought by the plaintiff of defendant, including insurance and interest, if any, during the time elapsing between plaintiff's purchase of defendant and plaintiff's orders to defendant to ship to plaintiff's customers the parcels thereof, as severally sold by plaintiff to each customer. This is to say, so long as plaintiff's goods lay in defendant's warehouse the plaintiff was incurring "carrying charges." The plaintiff paid these charges to defendant in the usual course of business between the parties, and now seeks to recover the alleged excess of charges paid by it to defendant. The referee allowed the plaintiff about \$1,300. There was an agreement between the parties as to what these charges should be, but a disagree-

ment upon the trial as to the terms of the agreement. I think one of these claims should be allowed—namely, bill on invoice No. 1,085 $\frac{1}{2}$, rendered by the Anglo-American Company to plaintiff, March 1, 1890. This was rendered at 12 $\frac{1}{2}$ cents per barrel after 30 days, total charged and paid, \$636.25. The charge at 12 $\frac{1}{2}$ cents seems to be right according to the Davis's testimony. The only question then is as to 60 days clear. There were 2,671 barrels, which at 12 $\frac{1}{2}$ cents overcharge for 1 month would be \$333.87 and this the referee allowed. Davis testified that plaintiff wrote to Fowler objections to the overcharge, and Fowler promised to look it up, but never did. Davis testified that this was a special lot and the bargain for storage a special one. Stobo testified: "Sometimes there may have been a special case where they might make a special arrangement, but, as a general rule, there was no such arrangement." I think the remainder of these claims are not meritorious. The plaintiff alleges that there was to be no carrying charge for the thirty days after plaintiff's purchase of goods; that after thirty days the charge was to be twelve and one-half cents per barrel per month for pork and per tierce for hams, and that any fraction of a month exceeding five days should be rated half a month. The defendant claims that the charge was to be twenty-five cents per month per barrel and per tierce, with no allowance of thirty days free of charge, and defendant rendered its monthly bills, and plaintiff paid them, upon this basis. The plaintiff's case is supported by the testimony of Henry Davis; the defendant's, by that of Henry Stobo, by the bills rendered and paid, by the books of both parties, by the entries of February 9, 1891, and June 24, 1891, in the book of minutes of plaintiff's board of directors, by the silence of the plaintiff until about the time of the open rupture between the parties. While I think it is clear in respect of the defective meats that the understanding between the parties was that defendant should make good to plaintiff the damage actually sustained by the plaintiff in consequence of the defects, notwithstanding plaintiff's payment of defendant's bills as rendered, it is not clear that a like understanding existed as to other matters. These bills were rendered monthly, and the plaintiff paid them with full knowledge of the facts, and without protest at the time of payment, nor until long afterwards. The reason for the understanding as to the defective meats is obvious, for their good quality was vital to the success of plaintiff's business, and as plaintiff did not see the meats sent by defendant to plaintiff's customers, the plaintiff had to await the complaints of its customers; but an error in carrying charges the plaintiff could detect when it received defendant's bill. Why it paid these bills year in and year out without complaint is not satisfactorily explained. It is true that Henry Davis testified with respect to these charges: "We rejected them when we received them. When the charges were made, we returned them." But the plaintiff's books do not corroborate him. In a case so largely made up of bills, invoices, letters, telegrams and extracts from ledgers, the written evidence of immediate rejection is not pointed out, whereas the written evidence of acquiescence is very considerable. Later rejection as the relations of the parties approached a rupture suggest preparation for it. There is indeed the letter of Anderson Fowler of June 7, 1892, "that every claim of the Davis Provision Company * * * shall be taken up, carefully considered and if it is shown to have any

merit, the claim shall be properly adjusted." If these bills had been paid upon the strength of this letter, as the plaintiff's notes of March, 1892, were renewed and paid upon it, or if they were shown to be meritorious, but technically prejudiced by a settlement which might have included them, but really did not, the case would be different. The difficulty with these claims is, they never were valid. We think the clear weight of the testimony is opposed to the finding of the referee respecting these claims, with the exception of the one allowed. (3) The claim allowed by the referee at \$1,402.50, for carrying charges and freight upon the lot of 550 tierces ordered for January, 1891, delivery held by defendant until March, 1891, and then shipped to plaintiff for defendant's convenience, without awaiting plaintiff's special orders, should have been disallowed upon the facts found. We have held in action No. 1 that the plaintiff was entitled to recover \$2,047.40, the damages it sustained upon this lot of goods by reason of the loss the plaintiff sustained by reason of defendant's departure from the terms of the contract as to delivery, and plaintiff's acquiescence therein upon defendant's promise of indemnity. In other words, the plaintiff recovered upon the basis of its acquiescence for a consideration in the changed terms of delivery. Therefore, it was liable for the carrying charges and freight in like manner as if the terms of delivery adopted had been the original terms. (4) The item of \$1,288.05, called the stockyard item, and allowed by the referee, should have been disallowed. The Minnesota Packing Company, of which Henry Davis was vice-president and manager, sent goods to the stockyards warehouse in Chicago for storage. Davis had then sent there in order to raise money for the Minnesota Company upon the warehouse receipts, which he did by drawing drafts upon the Davis Provision Company. The Davis Company, we assume, accepted the drafts, but as the Minnesota Company could not pay the drafts, the Davis Company had to take the goods, and in order to enable it to do so, the Anglo-American Company paid the Stockyards Company its storage charges—\$1,288.05. Apparently these charges were a lien upon the goods—that was a question between the Minnesota Company and the Davis Company. The Minnesota Company was then embarrassed for money, and whatever former credit the Stockyards Company had extended it when its credit was good, did not waive its lien upon this occasion, but whether the lien existed or not, the Anglo Company, assuming to act for the Davis Company, paid them and charged the sum to the plaintiff in its accounts, and the plaintiff paid it by including it in the amount of the note for \$27,102.21 given by the Davis Company to defendant March 11, 1892. How it was done is stated in the opinion in case No. 1. It was done with full knowledge of all the facts except as to the amount of the item, and how that should be ascertained was agreed upon. Whatever other claims Davis then reserved for future adjustment, he did not reserve this. We think it is too late for the plaintiff to change its position to the prejudice of the Anglo-American Company, after having had the benefit of the Anglo Company's advance. (5) There is no objection, except its age and presumptive inclusion in the settlement of June 24, 1890, to the plaintiff's claim of \$123.50 for the expenses of Mr. O'Connor in going to Albany to examine the Davis Company's books at the instance of the Anglo-American Company in November, 1887. The expense was incurred for the defendant, but charged by it to the Davis Company, and paid by it. The

item seems to be meritorious, and as such the defendant ought to have allowed it pursuant to the terms of Mr. Fowler's letter of June 7, 1892. This item is embraced in the separate judgment against the Anglo Company. It follows that the separate judgment against the defendant, the Anglo-American Provision Company, should be modified by reducing it to the items \$333.87 and \$123.50, with interest thereon as allowed in the judgment, and against both defendants by reducing it to \$1,260.91, with interest from May 9, 1893, with the costs as allowed below, less allowance upon the amounts deducted, and as reduced, affirmed, without costs. All concurred.

The Colonial City Traction Company, Appellant, v. The Ulster and Delaware Railroad Company, Respondent.—Order affirmed, with ten dollars costs and disbursements.—**PER CURIAM:** Upon the case as presented, the plaintiff was not entitled as matter of right to a temporary injunction. It was at most within the discretion of the court, and no sufficient ground is apparent for us to interfere with the discretion of the Special Term, or exercise our discretion, if in our power to do so, in favor of the plaintiff. We do not consider the other propositions discussed by the court below, or pass upon the questions involved in the merits of the case. They can be better disposed of at the trial. We therefore, affirm the order. All concurred.

Philip Beichert, Respondent, v. Frederick H. Reed and George N. McKibbin, Appellants.—Judgment and order reversed, new trial granted, costs to abide the event.—At the time of the accident upon which this action is founded, the defendants were copartners in business, and were engaged in building a line of electric railway in the city of Kingston, known as the Colonial Electric railroad. The plaintiff was a laborer in the employ of the defendants, and prior to the happening of the accident had been engaged in digging the ground in preparing the roadbed for the laying of the rails. Upon the day of the happening of the accident, one of the foremen of the defendants instructed the plaintiff with others to go to an avenue, which he named, to carry rails. It appears that a number of rails were left in a ditch or trench which had to be excavated deeper than it then was, and the foreman told the plaintiff and the other workmen with him to remove the rails from the ditch to one side; these rails were thirty feet long and weighed from eight hundred and fifty to nine hundred pounds; they were to be removed for a distance of ten or twelve feet. Ten or twelve laborers took hold of each rail with their hands, lifted it from the ditch, and carried it to the place of deposit. In describing the manner in which the accident happened, the plaintiff says, "We carried out one rail—we carried out the second rail, and the third rail we carried out and they 'threwed' it down, and the rail kind of rebounded and struck my foot." And again he says, "We stood up like this (indicating) and dropped it down." The distance that they dropped it was between two and three feet. One of the plaintiff's witnesses also testified, "At the time we dropped it down we sort of threw it from us. We did not want it upon our feet. This rail struck upon another rail lying there and bounded from that rail and went over on his foot." Evidence was given upon the trial as to the use of tongs in carrying rails; that they were proper and convenient, but the evidence shows that none were used in carrying the rails in question, and that neither the foreman nor any one else produced any tongs for that purpose or suggested their use to the workmen, although the prepon-

derance of evidence seems to be that tongs were furnished by the defendants for use in carrying rails, and that they were stored in the tool chest at night, and were in sufficient number to carry on the work of removing the rails.—

HERRICK, J.: It seems to me unnecessary to consider the evidence in relation to the tongs, or what the duty of the defendants required them to do in relation to furnishing them, or as to whether the foreman stood in the place of the defendants, and his act in not producing the tongs and furnishing them to the plaintiff and the other workmen, was the act of the defendants, or whether it was the act of a fellow-servant, because it appears to me, from an examination of the evidence, that the immediate and proximate cause of the injury to the plaintiff was the manner in which he and his fellow-workmen engaged in handling the rails dropped or rather threw from them the rail which caused the injury. If they had laid the rail down, an accident would not have happened. The taking of these rails out of the ditch and removing them to the side of the road, a distance of ten or twelve feet, was not labor that required any great skill or intelligence to perform. The immediate cause of the accident was throwing the rails down a distance of two or three feet upon other rails, which would naturally cause, and did cause, a rebound; this act was one in which the plaintiff participated with his fellow-workmen, and it was the immediate cause of the injury, and for it the defendants cannot be held responsible. Without discussing the other questions argued before us, but because of the act of the plaintiff himself, the judgment and order should be reversed, and a new trial granted, costs to abide the event. All concurred.

Isaac Reiffeld, Appellant, v. The President, Managers and Company of the Delaware and Hudson Canal Company, Respondent.—Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.—Appeal from an order made at Special Term, granting to defendant a new trial upon newly-discovered evidence.—**PER CURIAM:** It appears from the record in this case that the plaintiff bases his right to recover upon the ground that the conductor of the defendant's train unlawfully ejected him from the car, after he had tendered the proper fare from East Albany to Troy. He testified that when, after leaving East Albany, the conductor rejected the ticket as not good, he, plaintiff, took out twenty-five cents and asked him to take the fare of twenty cents out of that. That the conductor refused to do so, and, notwithstanding such tender, put him off. The witnesses called to corroborate plaintiff tell substantially the same story. The conductor denied that plaintiff tendered any money. And such was the issue which the court presented to the jury. The jury were told by the court, in substance, that if the plaintiff refused to pay his fare the conductor had the right to put him off, using no unnecessary violence or risk in doing so. If he did tender the twenty-five cents, then he was unlawfully put off. The question as to the validity of the ticket, or where or when plaintiff purchased it, was not presented to the jury in any form. It is manifest then, that such question was quite immaterial to the real issue upon which this case was decided. The newly-discovered evidence of both Taylor and Hessberg relates only to the question as to the validity of the ticket, and where it was purchased. It tends to contradict the testimony of the plaintiff that he purchased the ticket in Albany a day or

so before he attempted to use it; but it has no bearing whatever upon the question whether he tendered the twenty-five cents to the conductor after such ticket was rejected. The newly-discovered evidence, therefore, does not bear directly upon the question which was submitted to the jury in this case. It does not tend to strengthen the defendant's position upon that question; and there is no reason to suppose that it would change the result were the jury again called upon to decide that same question with the additional evidence before them. It is true that it is an additional contradiction of the plaintiff's testimony as to when and where he purchased the ticket, and to this extent may be said to be evidence tending to impeach him. But there are already in the case at least two witnesses who directly contradict his statement in that regard, and the addition of two more upon such question is not only cumulative but it also bears so indirectly upon the issue that it can hardly be expected to change the result. (*O'Harra, as Administratrix, etc., v. N. Y. C. & H. R. R. Co.*, 92 Hun, 56; *Todd v. Eighmie*, 10 App. Div. 142.) The suggestion of general bad character and a lack of veracity on the plaintiff's part is met by numerous affidavits of his acquaintances to the contrary, and we are satisfied that the newly-discovered evidence is not of such a character, within the well-settled rules above cited, to warrant the granting of a new trial in this case. The order appealed from is, therefore, reversed, with ten dollars costs and disbursements, and the motion for a new trial denied, with ten dollars costs. All concurred, except Putnam, J., not sitting.

The Pecksport Connecting Railway Company, Appellant, v. William M. West, as Executor of and Trustee under the Last Will and Testament of Alonzo Peck, Deceased, and Others, Respondents.—Order confirming the report of commissioners modified by striking out therefrom the direction that compensation be made to Roger Peck Smith as owner, and the further direction that the sum awarded be paid over to William M. West as executor and trustee, and providing therein, in lieu thereof, that such sum be paid into court subject to the further order of the court as to its ownership and disposition, and as so modified affirmed, without costs.—Appeal from order of the Special Term confirming the report of commissioners appointed in proceedings to condemn lands.—

PER CURIAM: After an examination of the record in this case we are of the opinion that the award of the commissioners should not be disturbed. The order of the Special Term, so far as it confirms their report, should be affirmed. But the provision of that order declaring that Roger Peck Smith was the owner of the sum so awarded is not correct. Upon the death of the testator, Alonzo Peck, the use of the real estate in question, by virtue of his will, vested in his wife and daughter Sophia, or the survivor of them, during their lives, and upon their death, or upon the death of Sophia and the marriage of the widow, the remainder is to vest in the children of Sophia. Roger Peck Smith, as the only child of Sophia, now represents the remaindermen, but upon the death of Sophia, her other children, should any be born, would become entitled to a share thereof. Their possible interests should be protected, and the ownership of the principal of this award should not be now adjudged contrary to their rights. The executor West is not a trustee under the will for them, or for the infant Roger Peck Smith, and there does not seem to be any reason for directing that he have the custody and control of this

fund which is ultimately to go to such child or children, especially should he not take possession of it without giving security therefor. The Code (§ 3858) provides that all persons having any estate, interest or easement in the property taken, or any lien, charge or incumbrance thereon, shall be deemed owners. It further provides (§ 3878) that if there are any adverse and conflicting claimants to the money awarded, or any part thereof, the court may direct it to be paid into court, and may determine who is entitled to the same, and may direct to whom it shall be paid. In view of this situation and of these provisions, we deem it best to modify this order by directing that the petitioner pay the amount of the award into court. That will relieve it from further responsibility in the matter, and the court, at Special Term, can make such further order in reference to the ownership of the fund, and as to its proper investment, as shall be to the interests of the owners and consistent with the views above expressed. As thus modified the order should be affirmed, without costs. All concurred.

Garret J. Benson, Appellant, v. International Contracting Company, Respondent.—Motion granted.

Mary Lamon, Respondent, v. Charles D. Sickler, and Everett W. Allen, Individually and as Administrator, etc., of Mary C. Allen, Deceased, Appellants.—Judgment affirmed, with costs. No opinion. All concurred.

The People of the State of New York, Respondent, v. Walton L. Bennett, Appellant.—Judgment of conviction affirmed. No opinion. All concurred.

Robert G. Scherer, as Assignee, etc., of Timothy J. Sullivan and Peter Ehlers, Composing the Firm of Sullivan & Ehlers, Respondent, v. Henry L. Smith, as Receiver of the Albany Horse Nail Company, Appellant.—Judgment affirmed with costs. No opinion. All concurred.

The Trustees of Emanuel Church, Respondent, v. The British America Assurance Company, Appellant.—Judgment and order affirmed, with costs. No opinion. All concurred.

John T. Thomas and Van Buren Thomas, Appellants, v. Mahlon McKinney and Mary E. McKinney, Respondents.—Judgment affirmed, with costs. No opinion. All concurred, except Parker, P. J., not sitting.

Helen S. Wright, Respondent, v. John Donigan, Appellant, Impleaded with Others.—Order affirmed, with costs. No opinion. All concurred.

Abel L. Chase, Respondent, v. Ira Brewer, as Administrator, etc., of Joseph Tucker, Deceased, Appellant.—Judgment affirmed. No opinion. All concurred.

Michael E. Garigon and Others, Respondents, v. Louis McC. Little, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion. All concurred.

Alfred B. Lehman, Respondent, v. Jacob Frank, Appellant.—Motion for leave to go to the Court of Appeals denied.

In the Matter of the Application for the Removal of Elmer E. Barnes from the Office of Police Justice of the Village of Hoesick Falls, N. Y.—Application denied, with ten dollars costs, without prejudice to the renewal thereof, upon additional papers.

Nicholas Pearson, Respondent, v. Lazarus Kahner and Others, Defendants; J. J. Cohen, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion. All concurred.

Gilbert F. Pearce, as Assignee, etc., of Mary G. Lyon, Appellant, v. John H. Day, Respondent, Impleaded with Others.—Order affirmed, with ten dollars costs and disbursements. No opinion. All concurred.

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- The People of the State of New York ex rel. John F. Ryan, Appellant, v. James W. Robertson, as Sheriff, and James White, as District Attorney of Washington County, Respondents.—Order affirmed. No opinion. All concurred.
- The People of the State of New York ex rel. George M. Hoyt v. Board of Trustees of Ballston Spa and Patrick Heeney.—Motion for leave to go to the Court of Appeals denied.
- The People of the State of New York, Respondent, v. Wilson E. Page, Appellant.—Judgment of conviction affirmed. No opinion. All concurred.
- Isaac Russkam and Others, Respondents, v. Fred Curtis, Appellant.—Motion denied, with ten dollars costs.
- City of Johnstown, Respondent, v. Andrew J. Rogers, Appellant, Impleaded with Maggie Rogers and Others.—Interlocutory judgment affirmed, with costs, with leave to defendant to serve an amended answer within twenty days, upon payment of the costs of the demurrer and of this appeal. No opinion. All concurred.
- City of Johnstown, Respondent, v. Andrew J. Rogers, Appellant, Impleaded with David Ireland and Others.—Interlocutory judgment affirmed, with costs, with leave to defendant to serve an amended answer within twenty days, upon payment of the costs of the demurrer and of this appeal. No opinion. All concurred.
- Emma S. Merriam, Appellant, v. Alice L. M. Sawyer and William A. Chapman, Respondents.—Judgment affirmed, with costs. No opinion. All concurred.
- Emma S. Merriam, Appellant, v. Edward Crandell and Emma Crandell, Respondents.—Judgment affirmed, with costs. No opinion. All concurred.
- William S. Gerity, Respondent, v. The Seeger and Guernsey Company and Charles L. Seeger et al., Appellants, Impleaded with George A. Dounce.—Judgment affirmed, with costs. No opinion. All concurred.
- Walter F. Keefer, Appellant, v. Russell J. McDowell, Respondent.—Judgment of the County Court affirmed, with costs. No opinion. All concurred.
- Russell J. McDowell, Appellant, v. John C. Biglow, Respondent.—Judgment affirmed, with costs. No opinion. All concurred.
- The People of the State of New York ex rel. James W. Robertson, as Sheriff of Washington County, Respondent, v. The Board of Supervisors of Washington County, Appellant.—Order appealed from affirmed, with ten dollars costs and disbursements. Motion to dismiss for failure to print papers denied. No opinion. All concurred.
- Wayland D. West, Respondent, v. Kate Pauley, Appellant, Impleaded with Others.—Interlocutory judgment affirmed, with costs. No opinion. All concurred.
- * Mary Bierce and Martha Bierce, Respondents, v. M. Ellsworth Jones, Appellant.—Judgment of the County Court affirmed, with costs. No opinion. All concurred.
- * Maggie Clark, as Administratrix, etc., of Horatio N. Clark, Deceased, Respondent, v. The New York Central and Hudson River Railroad Company, Appellant.—Judgment and order affirmed, with costs. No opinion. All concurred, except Putnam, J., not sitting, and Landon, J., not voting.
- * The B. Fischer Company, Respondent, v. Fred C. Greene, Defendant; John H. Robinson, Appellant.—Order reversed, with ten dollars costs and disbursements, and motion to set aside judgment granted, with ten dollars costs.
- * Laura E. Grube, Respondent, v. the City of Elmira, Appellant.—Judgment and order affirmed, with costs. No opinion. All concurred.
- * In the Matter of the Application for the Removal of Leonidas B. Gleason from the Office of Supervisor.—Application for the removal of the above-named supervisor denied, on the ground that he is neither a town nor a village officer, within the provisions of chapter 573 of the Laws of 1896.
- * Henry Tefft, Appellant, v. Hugh Lindsay, Respondent, Impleaded with Daniel E. Lynn.—Judgment affirmed, with costs. No opinion. All concurred.
- + In the Matter of Objections of Eugene W. Bates and Edward C. Alger to Certificate of Independent Nomination of County Officers in Cortland County.—Appeal from order affirmed.
- + In the Matter of Review of the Determination of the County Clerk of Clinton County Respecting Certificates of Nomination at a Republican Convention held in Clinton County, October 5, 1897.—Order appealed from affirmed.

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- In the Matter of the Application of Charles Odell for a Peremptory Writ of Mandamus, etc.—Order modified by striking therefrom the award of costs, and as modified affirmed, without costs. All concurred. No opinion.
- In the Matter of the Application of The Staten Island Midland Railroad Company.—Objections overruled. Objectors must file answer within five days, and the issues that may be joined are hereby referred to George W. Wingate to take proof as to the same, and report his opinion thereon. Reference to proceed on five days' notice.
- Minnie Noble v. The New York Central and Hudson River Railroad Company.—Application for leave to appeal to the Court of Appeals granted.
- Mary Reed v. William H. McCord.—Application for leave to appeal to the Court of Appeals granted.
- Bly E. F. Witthaus, Respondent, v. Rudolph A. Witthaus, Appellant.—Order modified by reducing counsel fee to \$125, and as modified, affirmed, without costs. All concurred. No opinion.

* The decision in this case was handed down October 1, 1897.

† The decision in this case was handed down October 22, 1897.

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— *A liquor tax certificate is a chose in action—it is assignable on demand as security for advances—a delivery not necessary—it need not be filed—what laches do not impute fraud.*

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— *An order to pay a third person from a fund—it must have a valuable consideration to make it an equitable assignment.*

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See *PRATT v. ROMAN CATHOLIC ORPHAN ASYLUM*..... 353

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ATTACHMENT — *An attaching creditor, substituted to the interests of others, is liable to the sheriff for his fees.*

See *DUFFY v. BURTON*..... 51

ATTORNEY AND CLIENT — *Measure of liability of attorneys representing a mortgage to be a first lien, which proves not to be so.] Attorneys who represent to their client that a mortgage which they have obtained for him is a first lien upon certain premises, are liable to the client for the sum he is obliged to pay in order to remove other and prior incumbrances (subsequently found to exist) which the attorneys failed to discover.*

The attorneys' liability is not limited simply to a possible difference in ultimate value to be determined by the amount which the client may succeed in collecting on a foreclosure of his mortgage. *FAY v. MCGUIRE*..... 569

— *A judgment roll is evidence for what parties an attorney appeared as bearing on his claim for compensation from others.*

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— *Mortgage foreclosure — voluntary appearance of a receiver as "John P. Jenkins, Receiver."*

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— *Evidence — testimony as to a statement by the advisory counsel of a corporation (made at a date subsequent to a settlement) as to the terms of such settlement, not admissible as against the corporation.*

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— *General Rule No. 27 — it does not permit an order, fixing the value of attorneys' services to a party to an action, to be docketed as a judgment.*

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BANKING — *Gift inter vivos — a savings bank book in account with the depositor and a third person — right of the third person to whom the book is delivered — when the transfer is not conditional — a savings bank account "in trust" — subsequent drafts by the depositor.] Evidence that Esther A. Proseus, just before going abroad, opened an account in a savings bank in the name of "Charlotte Porter or Esther A. Proseus," and permitted Charlotte Porter, who was her sister, to draw money from the account and to retain possession of the bank book until the death of Esther, is sufficient to make out a valid gift inter vivos; nor is this changed to a revocable gift, causa mortis, by proof that, after the donor had returned from abroad and shortly before her death, Charlotte Porter wrote a letter in which she said, "Just before she went to Europe the last time, Mrs. Proseus made me go to the bank with her, and then she put money in for me; in case anything happened to her the money to be mine, and no one could take it from me," as this language may be regarded as indicating that Mrs. Proseus feared she might not return, and, therefore, made a present permanent provision for the donee.*

The fact that Esther A. Proseus, after having had another savings bank account changed so that it stood "Esther A. Proseus in trust for Charlotte Porter," and having delivered the pass book to Charlotte Porter, drew money from the account, is not necessarily inconsistent with the existence of a trust in favor of Charlotte Porter.

The conclusions above stated are supported by the further fact that Esther A. Proseus by her will requested Charlotte Porter to convey to the husband of the testatrix land to which Charlotte Porter held the nominal title, and said nothing in reference to the bank accounts. *PROSEUS v. PORTER*..... 44

— *Agreement to indemnify a bank for thefts of its secretary — when "indebtedness" covers his own thefts and those of his subordinates occurring by his connivance or negligence — parol evidence as to the meaning of the agreement — interest.*

See *LATIMER v. VREADER.*..... 418

— *Payment — not effected by a transaction between the president of a bank and its debtor, also a creditor of the president, by which both debts are sought to be canceled.*

See *DUNDEE NAT. BANK v. HUNTINGTON.*..... 104

BANKRUPTCY — *What acts on the part of trustees of a corporation are fraudulent.] Where a corporation is either already insolvent, or is on the verge of insolvency, its trustees cannot allow one of its officers to acquire a preferential lien on the corporate assets by permitting him to obtain obligations of the corporation upon which he can readily procure judgment.*

See *HALPIN v. MUTUAL BREWING CO.*..... 588

BILLS AND NOTES — *Failure of consideration.*] 1. Where promissory notes are executed and delivered by their maker upon a promise made to him, by the secretary of a foreign corporation to the order of which they are made, to the effect that either he or the company will turn over to the maker advertisements sufficient to pay the notes, that the proceeds of these advertisements shall be applied to their payment, and that the maker shall never be compelled to pay anything upon the notes, a failure ever to turn over any advertisements to the maker constitutes a failure of consideration as well as a breach of the condition upon which the notes were delivered by the maker. *ANDREWS & CO. v. HESS.*..... 194

2. — *Fraudulent diversion — bona fide holder.*] Where the company subsequently transfers the notes in payment of an antecedent debt to a person who merely receipts for the notes and gives credit therefor upon his books, the transferee is not a *bona fide* holder and the maker may as against him successfully interpose the defense of a fraudulent diversion. *Id.*

3. — *An order to pay a third person from a fund — it must have a valuable consideration to make it an equitable assignment — lien for work done.*] An order made by a ship carpenter having a lien for repairs upon a house boat, directed to the owner, stating "will you please pay to Kraemer Bros. the amount of the balance on contract, and also on extra work, and charge to my account," does not, in the absence of proof of any consideration therefor, constitute an equitable assignment of the claim, and is not a bar to the assertion of a lien on the boat by the ship carpenter for the work done thereon.

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4. — *Effect of the giving of a note, upon the right to file a mechanic's lien.*] The fact that a sub-contractor receives from the principal contractor a note for his claim against him, does not extinguish the debt, nor prevent the former, upon the dishonor of the note, prior to the expiration of the time for filing a mechanic's lien upon the premises, from availing himself of that remedy. *MILLER v. SMITH.*..... 507

BOARD — *Of town officers.*

See TOWN.

BONA FIDE PURCHASER — *Of negotiable paper.*

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— *Municipal corporation — "electors," as used in chapter 525 of 1888, authorizing the acquisition of lands for village park purposes — power of the villages to issue negotiable bonds to pay for such lands — a holder of a bond is an equitable assignee of the debt.*

See SCOTT v. TWOMBLEY...... 535

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See MAY v. BERMEL...... 58

— *Libel — order of arrest in a civil action for libel — what is a final decision within the meaning of the undertaking that the plaintiff was "not entitled to the order of arrest" — vacation of the order on the merits.*

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CONSTITUTIONAL LAW — Interstate Commerce — an ordinary scrub brush, made by convict labor in Ohio and not branded to that effect, may, notwithstanding chapter 931 of 1896, lawfully be possessed and sold in the State of New York — limits of the police power of a State.] 1. Chapter 931 of the Laws of 1896, providing that all goods made by convict labor, before being exposed

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for sale or sold, shall be labeled, marked or branded as specified in the act, and section 384b of the Penal Code, making a violation of such requirement a misdemeanor, do not justify the indictment of a person for having in his possession in the State of New York, for the purpose of sale, and of selling, a certain scrub brush "of the form, style and material commonly used in scrub brushes," manufactured by convict labor in the State of Ohio, not labeled, marked or branded as required by the statutes of the State of New York, but recognized as property in the State of Ohio, and not claimed to be an inferior or deceptive article.

Such a scrub brush is an article of commerce, protected by the interstate commerce clause of the United States Constitution, and neither its possession nor its sale can be affected or controlled by the exercise of the police power of a State; such power only extends to property which does not belong to commerce. *PEOPLE v. HAWKINS*..... 494

2. — *Lease of agricultural lands for a life — not invalid until after the expiration of twelve years.*] A lease of agricultural lands within the State of New York, which, by its terms, continues during the natural life of the lessor and of his wife, and by which an annual rent is reserved, is not rendered invalid by the provisions of section 13 of article 1 of the Constitution of the State of New York, certainly until the expiration of the twelve-year limit fixed by said provision of the Constitution. *PARISH v. ROGERS*..... 279

8. — *Police power — regulation of speed of cars in city streets.*] The rate of speed of cars in streets and highways cannot be made the subject of contract either by the Legislature or by the common council of a city, as the matter is within the police power of the State, and the Legislature cannot divest itself of such power. *CITY OF BROOKLYN v. NASSAU R. R. Co*..... 81

— *An action for the specific performance of an insurance contract — failure of the company to create and divide a reserve fund — a policyholder cannot sue for specific performance — the action lies against the officers and not the corporation only — constitutional law.*

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— *The Legislature cannot modify a contract made by the Supreme Court Reporter.*

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CONSTRUCTION — Of constitutional provisions.

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— *Of deeds.*

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— *Of wills.*

See WILL.

CONTEMPT — *Where a railroad fails to obey a judgment requiring it either to remove an obstruction or to condemn land — appeal.*] In an action brought against a railroad company by the owner of premises (access to and the enjoyment of which it had injured by the construction of its road) the court adjudged that the railroad was guilty of erecting an obstruction to the plaintiff's premises, awarded judgment for \$500 damages and directed the removal of the obstruction unless the defendant should pay \$2,000 within sixty days, or should in this time construct a proper crossing over or under its road, and institute condemnation proceedings to acquire the land in question. The railroad took no appeal from this judgment, paid the \$500, and constructed the crossing, but failed to remove the obstruction or institute condemnation proceedings.

CONTEMPT — *Continued.*

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Held, that the railroad was guilty of a contempt of court and could not dispute the validity of the former mandate of the court, upon an appeal from an order imposing a fine entered in subsequent proceedings for contempt taken by the owner of the premises.

RAY v. NEW YORK BAY EXTENSION R. R. Co. 539

— *An Appellate Division may, upon an appeal from an order denying an application for a peremptory writ of mandamus, grant the writ — to disregard a writ so granted is a contempt of court.*

See PEOPLE EX REL. KAVANAGH v. GRADY. 27

CONTRACT — *Construction of an agreement for the negotiation of a loan — when a refusal to accept the loan is not justified.*] 1. The owner of certain land wishing to obtain funds with which to pay certain taxes which were a lien upon the premises, executed an agreement by which she commissioned a broker to obtain a loan of a specific sum of money which was to be secured by a mortgage upon the premises, the agreement providing that out of the commission which the owner agreed to pay such broker "all searches of title and incidental expenses (are) to be paid except the procuring of the tax bills, which expense, if any, I (the owner) will pay."

Held, that the owner was not justified in refusing to accept the loan because a bank, with which the broker had placed the loan, had not obtained searches or estimates showing the exact amount of the taxes, so that the owner might know whether the loan would provide her with funds adequate for their discharge, as under the agreement the duty of obtaining the tax bills was incumbent upon the owner;

That the objection that there was no proper tender of the loan or of a proper bond or mortgage, was unavailing, it appearing that the bank was ready and prepared with the necessary funds, and that the bond and mortgage had been prepared;

That the fact that the condition of the proposed mortgage required the loan to be paid in three years, the term specified in the agreement authorizing the broker to secure the loan, and the condition of the bond required it to be paid in one year, in the absence of objection made at the time, and of the attention of the parties being called to the matter, did not justify the refusal of the owner to accept the loan. SCUTT v. WOOLSEY 541

2. — *Contract to supply a windmill and water tower — their failure to supply the house with water — charge of the judge.*] Where, in an action brought by a contractor to recover the price of an apparatus which was designed to supply with water the house of the defendant, but failed to do so, the testimony is conflicting as to the cause of the failure, and the court, upon the trial of the action, charges the jury that the plaintiff must prove substantial compliance with the contract in order to recover, and that if the jury believed that the plaintiff did not put the tank and tower in good substantial working order under the contract they must find for the defendant, and then, without exception by the defendant, adds, that as the court reads the contract, there is no guaranty by the contractor that the plant will produce any certain result, and that if the contractor has fulfilled the specifications, he has performed the contract and is entitled to his money, a verdict rendered in favor of the contractor must be allowed to stand. BARNES v. LOEW. 17

3. — *Action for the breach of a promise to loan money repayable on demand, when maintainable.*] The general rule is that an action cannot be maintained for the breach of a contract to loan money repayable on demand; but where a brewing company agrees, for a valuable consideration, with a saloon keeper, whose fixtures and license are already subject to a valid existing chattel mortgage held by a rival company, that, if he will thereafter sell its beer, it will satisfy the existing chattel mortgage, advance him an additional sum and take as security a chattel mortgage for all the moneys thus to be paid and advanced by it, and after paying such additional sum it secures from the saloon keeper a chattel mortgage for the amount of its money advance, and also for the amount of the existing mortgage, but thereafter fails to satisfy the existing chattel mortgage, as a result of which such existing mortgage is subsequently foreclosed for the reason that the saloon keeper is unable, because of the existence of the chattel mortgage thus given to the first-mentioned brewing company, to raise any money to pay

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the first mortgage, the saloon keeper may maintain an action against such brewing company for damages resulting from the breach of its promise.

DOUSHKESS v. BURGER BREWING Co...... 375

4. — *Measure of damages.*] In such a case the measure of damages is the difference between the value of the property and the amount of the liens upon it; and, in view of the fact that the chattel mortgage given to the rival brewing company contained a stipulation that, if a sale should be had under it, the charges incurred in its foreclosure should be deducted from the proceeds, he is also entitled to recover the expenses of the foreclosure. *Id.*

5. — *Contract to build a house — when abrogated by its modification — recovery as upon a quantum meruit.*] Where the owner of a house, who has entered into an agreement with a contractor to build an addition to the house for a certain amount, subsequently commissions the contractor to increase the size of the extension and to replace the old house with a new and larger one, but fails to fix a price for the entire work, although he actually pays a sum for the work done exceeding the price named in the original agreement, that agreement must be considered as abrogated by the subsequent negotiation, and the contractor may recover as upon a *quantum meruit* for the work done.

BALDWIN v. KELLY...... 19

6. — *Instruments executed about the same time, not construed together when they relate to different properties*] *Semble*, that the rule that, where two instruments are intended to embody a contract between the parties, they must be read and construed together, and that the fact that they bear different dates is immaterial, if the contract is not carried into effect until both are executed, does not apply to instruments executed upon several successive days which relate to different properties. *DORTHY v. STRAUCHEN.*..... 89

— *Independent collateral oral agreement between an insurance company and its general agent — it may be proved although the contract of agency is in writing — interference with the sub-agents and the business of the general agent, when the agency ends — damages may be recovered although difficult of ascertainment and speculative.*

See STOWELL v. GREENWICH INS. Co...... 188

— *An ante-nuptial contract made in a foreign State — when a bar to a tenancy by the curtesy — the contract inures to the benefit of the wife's devisee or heir — a possessory action by the heir entertained in equity — legal privity unnecessary — demand of possession by letter.*

See WHITE v. WHITE...... 560

— *Indemnity bond against damage to vessels by reason of existing contracts — where a vessel is libeled because of such a contract the indemnitors cannot show that the contract was void — measure of damages — duty to make the damages as small as possible.*

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— *Agreement to indemnify a bank for thefts of its secretary — when "indebtedness" covers his own thefts and those of his subordinates occurring by his connivance or negligence — parol evidence as to the meaning of the agreement — interest.*

See LATIMER v. VEADER...... 418

— *Money paid for a sale of the control of an insurance corporation — it cannot be followed by its receiver into the hands of the holder of an invalid obligation of the corporation.*

See MCCLURE v. TRASK...... 466

— *A liquor tax certificate is a chose in action — it is assignable on demand as security for advances — a delivery not necessary — it need not be filed — what laches do not impute fraud.*

See NILES v. MATHUSA...... 483

— *Money had and received — contract by the directors to turn over the control of an insurance corporation to a party paying therefor — an action does not lie against them by its receiver for money received.*

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- *Executory contract of sale — recovery of the money paid on the delivery of the goods on the ground that they were not as they were represented to be.*
 See TRYON v. PLUMB 530
- *An order to pay a third person from a fund — it must have a valuable consideration to make it an equitable assignment — lien for work done.*
 See SHAW v. TONNS 39
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 See HAZLETON v. WEBSTER 177
- *A contract by a husband to furnish to his wife proof of his adultery, to enable her to procure a divorce, is unenforceable.*
 See TRAIN v. DAVIDSON 577
- *Law relating to bonds.*
 See BOND.
- *Damages recoverable for its breach.*
 See DAMAGES.
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- *Of insurance.*
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- *Of sale of personal property.*
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- *Specific performance of.*
 See SPECIFIC PERFORMANCE.
- *Of sale of real property.*
 See VENDOR AND PURCHASER.

CONTRIBUTORY NEGLIGENCE:*See* NEGLIGENCE.**CONVERSION — Of personal property.***See* PERSONAL PROPERTY.**CONVEYANCE — Of real property.***See* VENDOR AND PURCHASER.*See* DEED.**CO-OPERATIVE TOWN INSURANCE:***See* INSURANCE.

CORPORATION — *Action by one trustee against the other trustees based upon their mismanagement of the corporation — a trustee need not formally accept his office.* 1. An action to enforce the remedies for the mismanagement of a corporation, provided by sections 1781 and 1782 of the Code of Civil Procedure, may be maintained by a duly elected trustee and vice-president of the corporation, although he in no manner signified his acceptance of his election to the offices in question, acceptance in such cases being usually presumed. HALPIN v. MUTUAL BREWING Co. 583

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2. — *Failure to attend meetings as a neglect of duty.*] The fact that the officer did not attend the meetings of the trustees for a period of about three months immediately following his election, does not constitute, as matter of law, such a long-continued neglect of duty as amounts to an abandonment of his office as trustee, nor does it justify his associates in declaring his office as trustee vacant. *Id.*

3. — *Acquiescence of all stockholders in fraudulent acts of trustees is not a defense.*] The acquiescence of all the stockholders of a corporation in the acts of its directors, in so dealing with its assets as to deprive future creditors of the corporation of the payment of their just claims, will not avail as a defense to an action brought by an officer of the corporation under section 1781 of the Code of Civil Procedure. *Id.*

4. — *A delinquent trustee credited with moneys paid for the benefit of the corporation.*] A delinquent trustee is, however, entitled to credit for moneys which he has contributed to the funds of the corporation and for his payment of its obligations. *Id.*

5. — *Trustee procuring fictitious notes signed by irresponsible persons to be discounted for the benefit of the corporation.*] Where such a trustee has indorsed, and applied the proceeds of, certain fictitious notes signed by irresponsible persons (not representing any real indebtedness to the corporation, but procured by him to be discounted to its credit by a bank) to the payment of other notes upon which the corporation was liable, the corporation is not damaged by the transaction and the trustee should not be charged with the amount of such notes. *Id.*

6. — *What acts on the part of the trustees are fraudulent.*] Where a corporation is either already insolvent, or is on the verge of insolvency, its trustees cannot allow one of its officers to acquire a preferential lien on the corporate assets by permitting him to obtain obligations of the corporation upon which he can readily procure judgment. *Id.*

7. — *Annual report of a corporation verified by the president only, when sufficient.*] Where the treasurer and secretary of a corporation has tendered his resignation, and the president of the corporation, pursuant to its by-laws, has exercised the duties and functions of treasurer and secretary, the filing of a report conforming in all respects to the requirements of section 80 of the Stock Corporation Law (Chap. 688, Laws of 1892), except that it is verified by the president alone, instead of "by the oath of the president or vice-president and treasurer or secretary," as required by the statute, constitutes a substantial compliance with the statute, and an action brought under that section to charge the directors of the corporation with liability for its debts, based upon the theory that there was a failure to file a report, cannot be maintained. *NOBLE v. EULER*..... 548

8. — *Acceptance of a resignation not essential to its effectiveness.*] The fact that the resignation of the treasurer and secretary was not formally accepted until after the filing of the report is immaterial, as the acceptance of a resignation is not essential to its effectiveness. *Id.*

— *Negligence—a lineman of a telegraph company killed by touching an iron brace upon his own pole, in contact with the bare wire of an electric lighting company—proof that a "flash" was caused by touching the iron brace with a wire.*

See *DWYER v. BUFFALO GENERAL ELECTRIC CO.*..... 124

— *Taxation—a foreign corporation producing kiln dried kindling wood, done up in bundles, is engaged in carrying on a manufacture and is not taxable upon its franchise or business—office and office furniture within the State.*

See *PEOPLE EX REL. STANDARD WOOD CO. v. ROBERTS*..... 514

— *Taxation—a foreign corporation slaughtering sheep and selling the flesh and converting the residue into marketable products is a manufacturing corporation.*

See *PEOPLE EX REL. N. E. MEAT CO. v. ROBERTS*..... 521

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— *Evidence — testimony as to a statement by the advisory counsel of a corporation (made at a date subsequent to a settlement) as to the terms of such settlement, not admissible as against the corporation.*

See *MORRIS v. BROOKLYN HEIGHTS R. R. Co.* 557

— *Money had and received — contract by the directors to turn over the control of an insurance corporation to a party paying therefor — an action does not lie against them by its receiver for money received.*

See *MCCLURE v. LAW* 459

— *Money paid for a sale of the control of an insurance corporation — it cannot be followed by its receiver into the hands of the holder of an invalid obligation of the corporation.*

See *MCCLURE v. TRASK* 466

— *The Municipal Court of Buffalo — it has no jurisdiction of an action between two domestic corporations non-residents of Erie county.*

See *REVERE RUBBER Co. v. GENESEE BLUE S. Co.* 166

— *Organized for banking purposes.*

See *BANKING*.

— *To carry on insurance business.*

See *INSURANCE*.

CORROBORATION — Of witnesses.

See *WITNESS*.

COSTS — *Additional allowance — it cannot be given in proceedings under the Buffalo Grade Crossing Act.*] 1. An owner of land in Buffalo, whose property has been taken in a street widening proceeding by the city grade crossing commissioners appointed under chapter 345 of the Laws of 1888, cannot be granted an extra allowance under section 12 of that act as none is thereby expressly provided for, and, the matter being a special proceeding, its costs are controlled by section 3240 of the Code of Civil Procedure, a section making no provision for extra allowances.

Nor can such an owner recover such an allowance under the Condemnation Law (§ 3372 of the Code of Civil Procedure),

First, as the Grade Crossing Act in question was passed some two years before the Condemnation Law, and there is nothing in the latter act to indicate that it was intended to apply to the Grade Crossing Act.

Second, as amendments to the Grade Crossing Act, regulating costs and taking effect on the same day with, and also after the passage of, the Condemnation Law, do not refer to the Condemnation Law, and

Third, as the two acts are not *in pari materia*, as the purposes of the Grade Crossing Act could not be accomplished by proceedings under the Condemnation Law. *MATTER OF GRADE CROSSING COMRS.* 271

2. — *A receiver may be charged with the costs incurred by his unnecessary defense — although in default, he is entitled to notice of an application to charge him, personally, with costs.*] Where a receiver made a party to an action brought to foreclose a mortgage, although served with a notice that no personal claim is made against him, interposes an answer denying any knowledge or information sufficient to form a belief as to the matters contained in the complaint, he becomes, upon his default at the trial of the action, liable for costs, but only to the extent of the costs incurred by the interposition of his answer; and before the plaintiff can charge the receiver, personally, with the payment of the costs, he is entitled to due notice of the application for such relief. *FIRST NATIONAL BANK v. WASHBURN* 518

3. — *Suing in forma pauperis — payment of the costs of a former action and security for future costs, not required.*] Where a petition which has been presented for leave to prosecute as a poor person is sufficient in form, and an order has been made granting the application, it is erroneous for the court subsequently to vacate such order, upon proof that costs of a former action between the same parties were due and unpaid by the plaintiff to the defendant, and to make an order staying the plaintiff's proceedings until their payment, and requiring him to give security for the costs of the pending action. *ROSA v. SECOND AVENUE R. R. Co.* 384

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4. — *Difficult and extraordinary case.*] An action to set aside a will held to be a difficult and extraordinary case. *SEAGRIST v. SIGRIST*..... 336

5. — *Additional allowance.*] An additional allowance of \$1,000 held, under the circumstances of the case, to be excessive. *Id.*

— *A judgment for the plaintiff in an action of conversion—when it is reversed, with costs, upon an appeal, the defendant is entitled to an execution against the person of the plaintiff.*

See KNAPP v. MURPHY. 83

— *Construction of a chattel mortgage of a license and its "renewal"—what will be construed to be an action to foreclose it—costs against a defendant claiming to have an interest.*

See MCNEELEY v. WELZ. 566

— *Foreclosure by a junior incumbrancer, not made a party—costs against purchasers who resist a redemption.*

See NAYLOR v. COLVILLE 581

— *Motion to open a default in pleading—costs not granted to abide the event.*

See RICHARDSON v. SUN PUBLISHING CO. 329

— *On appeal from the Municipal Court of Rochester.*

See CLARK v. MALZACHER 301

COUNTY—*A county clerk cannot be allowed by the board of supervisors for money paid to his assistants in assorting jury slips.*] 1. The direction contained in section 3290 of the Code of Civil Procedure, that "Each clerk of a court must perform all duties required of him, in the course and practice of the court, without fee or reward except as expressly prescribed by law," is not affected nor repealed by the subsequent passage of subdivision 9 of section 230 of "the County Law" (Chap. 686 of the Laws of 1892), enumerating, among county charges, "the moneys necessarily expended by any county officer in executing the duties of his office in cases in which no specific compensation for such services is provided by law."

The word "services" in the latter act must be deemed to refer only to such services as a county clerk was authorized to charge for under the law existing when the County Law was enacted, and consequently a county clerk is not entitled to have allowed to him by the board of supervisors, as a county charge, moneys which he paid to his assistants for assorting and arranging jury slips.

The services which a public officer is directed to perform himself, as distinguished from those which he cannot, in the nature of the thing to be done, personally perform, considered. *MATTER OF WALSH v. SUPERVISORS.*..... 489

2. — *Proof required under the County Law that the money was necessarily expended.*] In cases falling within the provisions of the County Law the claimant must establish the fact, before the board of supervisors, that the money claimed was "necessarily expended" by him. *Id.*

COURT—*The Municipal Court of Buffalo—it has no jurisdiction of an action between two domestic corporations non-residents of Erie county.*

See REVERE RUBBER CO. v. GENESEE BLUE S. CO...... 166

COVENANT—*Independent collateral oral agreement between an insurance company and its general agent—it may be proved although the contract of agency is in writing—interference with the sub-agents and the business of the general agent, when the agency ends—damages may be recovered although difficult of ascertainment and speculative.*

See STOWELL v. GREENWICH INS. CO...... 188

COVERTURE:

See HUSBAND AND WIFE.

CREDITOR:

See DEBTOR AND CREDITOR.

CREDITOR'S SUIT—*To set aside fraudulent conveyances.*

See FRAUDULENT CONVEYANCE.

CRIME—*Arson—a priest, by his servants, burning a parochial school building to get the insurance—evidence as to his relations with his servants—his insolvency.*] 1. Where a prosecution for the crime of arson is conducted upon the theory that the defendant, the pastor and treasurer of a church at Charlotte, near Rochester, and a member of its board of trustees (consisting, besides himself, of two lay members, the vicar-general and the bishop of the diocese), who had been threatened by the bishop with immediate removal from his charge, procured a parochial school building, where a school was conducted by three sisters, under his supervision, to be burned by his two servants, John Cronin and Nora Cronin, in order to get the insurance money and thereby secure the payment of a balance of salary due him as pastor and pay his debts, proof is admissible that his relations with the servants in question were confidential; that he had caused real estate to be conveyed to them without receiving any consideration therefor, and in some cases without their knowledge; that he was insolvent in the month when the fire took place, and that executions were then outstanding against him, and that his relations with the sisters at the school had become somewhat strained and disturbed. *PEOPLE v. FITZGERALD*..... 139

2. — *A telegram sent to a servant on the day before the fire.*] After the People have proved that the defendant, having arranged for an entertainment to be given in the school building upon the night of the fire, left his home for Troy on the morning of the day before the fire occurred, they may show that he, only a few hours later, prepared upon the train, and sent from Syracuse to Nora Cronin, a telegram in the following words: "Tell Mr. Ellis I was called away suddenly; return if possible to-night. Have Johnnie close all doors and lights out after entertainment; many tramps now in Charlotte: use your own best judgment." *Id.*

3. — *Res gesta of the flight of an accomplice.*] In such a case the People may properly give the following evidence:

Where proof has been made that watchers of the parochial school building upon the night of the fire saw John Cronin come out of the defendant's residence and go in the direction of the school building, and thereafter saw a blaze in it, and a man rush out of the building, who, being pursued, ran into the defendant's house, where Nora Cronin was found standing in the dining-room door with a lamp in her hand, which, upon the appearance of the officer, she blew out, thus enabling the man to escape temporarily (notwithstanding which act the officer was enabled to identify the man as John Cronin), the People may show, as a part of the *res gesta* of the flight of John Cronin, that Nora Cronin was dressed in ordinary clothes, and that her hair was done up in the same manner as if she had been at work, although the fire occurred about two o'clock in the morning. *Id.*

4. — *The accused should account for his whereabouts.*] An examination of John Cronin as to his whereabouts on the night of the fire is admissible.

Señble, that where, in such a case, it is in the power of an accused person to account for his whereabouts, the fact that he fails to do so is strong presumptive evidence against him. *Id.*

5. — *Acts of insurance agents applied to for insurance—admissions of accused that he could not get property insured in his own name.*] The bookkeeper of an insurance agent may testify that he hesitated, in the absence of his principal, to issue, within a week of the fire, the additional policies which the defendant requested upon the parochial building, for the reason that he knew that the company would not carry any insurance in the name of the defendant, but that he thought that perhaps the agent would write the policies in another shape.

The agent himself may testify that two days before the fire occurred he notified the defendant that his company would cancel the policies which it had issued, and that it would not insure any property in Charlotte, "especially on Father Fitzgerald's (defendant's) property;" and a mortgagee of the property of the defendant may testify to a statement of the defendant, in substance, that he could not get his property insured in his own name, and that he would have it transferred to some one else in order to effect the insurance, mentioning in this connection Nora Cronin. *Id.*

CRIME—Continued.

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6. — *Demand after a loss that moneys be paid to the trustees of his church and not to the bishop—letter of his bishop charging the priest with "public drunkenness."*] The People may also show that the defendant, in demanding payment to himself of the insurance moneys, stated, in effect, that the trustees of the church would do anything he told them to do; that the money must be paid to the trustees; that if the company settled with the bishop or any one else he would hold it responsible, and that he was willing to sacrifice a little on the policies if a prompt settlement were made; and may further show by the lay trustees of the church that the latter had no part in obtaining the insurance in question, and that it was procured solely by the defendant; and by the bishop, in charge of the diocese, having the power to remove priests, a conversation which he had with the defendant a few hours after the bishop had written him a letter complaining of his "repeated and public drunkenness," and threatening him with removal from his charge, in which the bishop, after the priest had said that he wished to deny the charge, replied that the priest need not bring witnesses "because his own appearance testified it (the charge) was true," and, upon the bishop's being asked whether there was any personal liability of the pastor, so far as the sisters conducting the parochial school were concerned, he may testify that "there was in this case; if he failed to carry on the parish and raise the necessary money, I should remove him and put some one in the parish. There was no personal liability on his part, so far as the sisters were concerned, outside of the revenues of the church." *Id.*

7. — *Letter admissible on question of motive for arson.*] The letter thus written by the bishop, when taken in connection with oral testimony of the bishop as to a conversation with the defendant covering the substance thereof, and with proof of the insolvency of the pastor, is admissible upon the question of motive, as it tends to show that an imminent crisis had arisen in the affairs of the pastor, involving, among other things, a need of money upon his part for the payment of his back salary and debts; and it may be inferred that, in burning the parochial school building, he was attempting to realize upon the insurance policies thereon, to the end that, when these moneys came into the hands of the trustees of the church, persons whom the pastor alleged that he was able to control, he could, as he might under the rules of the church, apply the moneys to the payment of the sum which he claimed the church owed him. *Id.*

8. — *Charge as to the failure of the accused to testify.*] Instructions by the court to a jury, relative to section 895 of the Code of Criminal Procedure, to the effect that the defendant's failure to testify as a witness on his own behalf should not create any presumption against him, and that the jury were not to assume that he would deny or admit any of the evidence, but must consider the evidence unaffected by the fact that the defendant did not take the witness stand, is a sufficient charge on the subject. *Id.*

9. — *Larceny—an indictment charging the offense in the terms of the statute, is sufficient.*] An indictment for larceny under subdivision 2 of section 528 of the Penal Code, is sufficient if it alleges that the defendant, while having in his possession as "servant, agent, attorney and bailee" (such being the terms used in the statute itself) the money in question, appropriated the same to his own use, and it is not necessary that the indictment should set forth the facts showing the agreement by which such relations were created.

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10. — *A judgment roll is evidence for what parties an attorney appeared, as bearing on his claim for compensation from others.*] Upon the trial under such an indictment, the defendant claimed to have acted in an action in conjunction with one Rich as counsel for certain parties represented by Rich. The claim of the prosecution was that the money which the defendant appropriated to his own use was given to him by Rich for the purpose of defraying referee's fees and other expenses in that action, while the claim of the defendant was that he had the right to and did apply the moneys upon an indebtedness due him from the clients of Rich for professional services.

Held, that the judgment roll in the action in question, from which it appeared that the defendant appeared for certain executors who were parties to the action, was competent evidence on the part of the People to show that

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the defendant's claim that he in any manner represented Rich's clients was without foundation for the reason that, as he was acting as attorney for the executors, he could not also represent the other parties to the action, and that, therefore, his claim to be entitled to the moneys as compensation for his services could not be maintained. *Id.*

11. — *His own acts, but not the decision of others, may be shown in the cross-examination of the prisoner to discredit him.*] Upon the trial under an indictment for larceny it is not permissible for the People upon the cross-examination of the defendant, who has been sworn as a witness in his own behalf, to prove by him that he had been expelled from the Baptist church, or that in proceedings to disbar him from practicing as an attorney and counselor at law, a referee and an Appellate Division of the Supreme Court had found him guilty of several specific acts of larceny, not connected with the one for which he was on trial, and also of suppressing evidence which should have been presented to a grand jury.

While such a witness may, upon his cross-examination, be compelled to testify as to collateral acts of his own tending to prove his moral degradation, he cannot be compelled, with a view to proving such moral degradation, or to impeach him as a witness, to testify to the conclusions of others, except it be the conviction for a crime, or such confinement in prisons or jails as would indicate a conviction. *Id.*

12. — *Arson—facts not constituting one an accomplice as matter of law—necessity of a criminal intent, which must be found as a matter of fact.*] A person not connected with nor concerned in the commission of the crime of arson in the first degree, and who, according to his own testimony, positively declined to assist in it, is not made an accomplice as matter of law by the mere fact that, at the request of the accused shortly before the crime was committed, he removed some plaster from a wall in a room of the building subsequently burned, through which wall the accused intended that the fire should spread, and had, at the time, without disclosing it, knowledge of the principal's guilty intention. Such a person is not incompetent to testify in corroboration of a confessed accomplice, as, in order to make an act criminal, the actor must perform it with an intention that it shall aid in the commission of the crime.

Semble, that when a question exists whether an act was done with such an intent, it should be submitted to the jury and must be by them answered in the affirmative before the actor can be held to have been an accomplice.

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13. — *Proof of a fire in a neighboring city, which was a part of the same plot, is admissible in corroboration of the testimony of an accomplice.*] Proof that, prior to the fire charged in the indictment, which occurred in a house in the city of New York, insured by the accused in his own name, he concocted and subsequently carried out a scheme to burn, at about the same time, in a house which he owned in Newark, N. J., and had insured in the name of another person, personal property removed from the New York house to the house in Newark, N. J., to the end that it might be there destroyed by an incendiary fire, coupled with proof that the same accomplice was concerned in both fires, and that both fires were planned by the accused to secure the insurance moneys, is competent upon the trial of the indictment for the fire in New York, as the two fires are so inseparably related in plan and execution that they may be regarded as a single transaction having two branches. *Id.*

14. — *Petit larceny—good character of the accused—conviction reversed as against the weight of evidence.*] A woman of good character, after making some purchases at a store, picked up a cotton umbrella, worth ninety-eight cents, belonging to the storekeeper, and with it and her purchases left the store. On reaching the door she said to her sister, who accompanied her, "See, this is not my umbrella," and at that moment was arrested on a charge of stealing the umbrella by a detective, who testified that she saw her take and remove the tag from the umbrella and slip the umbrella under her cape, in which statement, however, the detective was not corroborated. The accused at once admitted the taking of the umbrella, stating that it was taken through inadvertence in place of her own silk umbrella.

CRIME — *Continued.*

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Held, that a conviction based upon such evidences should be reversed under section 527 of the Code of Criminal Procedure, making it the duty of the appellate court to order a new trial when it is satisfied that the verdict is against the weight of evidence or against law, or that justice requires a new trial, "whether any exception shall be taken or not in the court below."

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— *Usury* — examination of the plaintiff before trial — objection that it will require the disclosure of facts constituting a crime.

See FOX v. MILLER..... 333

CUSTOM:

See USAGE.

DAMAGES — Indemnity bond against damage to vessels by reason of existing contracts — where a vessel is libeled because of such a contract, the indemnitors cannot show that the contract was void — measure of damages — duty to make the damages as small as possible.

See NIAGARA FALLS PAPER CO. v. LEE..... 217

— *Elevated railroads* — basis for injunctive relief — damages to easements from ashes and cinders which fly from dumping ground into the windows of a house are recoverable as past or rental and not as fee damages.

See EMIGRANT MISSION COM. v. BROOKLYN EL. R. R. CO..... 596

— *Sale of real estate* — action by the vendee to recover liquidated damages — failure to show performance or a tender thereof — exacting what the contract does not provide should be given.

See LIGHTHALL v. MCGUIRE..... 248

— *Action against an elevated railroad for rental damages* — examination of witnesses as to rental values of specific properties, allowable only on cross-examination.

See O'SULLIVAN v. NEW YORK ELEVATED R. R. CO..... 384

— *Action for the breach of a promise to loan money repayable on demand, when maintainable* — measure of damages.

• See DOUSHKESS v. BURGER BREWING CO..... 375

— *Contract to build a house* — when abrogated by its modification — recovery as upon a quantum meruit.

See BALDWIN v. KELLY..... 19

— *Damages may be recovered although difficult of ascertainment and speculative.*

See STOWELL v. GREENWICH INS. CO..... 188

— *Duty of a party subjected to an injury to make the damages as small as possible.*

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— *Libel* — when vindictive damages are proper.

See KARWOWSKI v. PITASS..... 118

DEATH — *Of one of the several defendants before the coming in of the report of a referee.*

See REFERENCE

DEBTOR AND CREDITOR — *A bona fide creditor "secured," to the exclusion of others.] 1. A debtor has a right to transfer his property to one creditor to the exclusion of his other creditors, provided the transfer is made in good faith and upon a reasonably adequate consideration in the amount of the debt thus paid; but the adequacy of the consideration is not material and will not protect the transfer where the intent of the transfer is to hinder, delay and defraud the debtor's creditors. COMMERCIAL BANK v. BOLTON...* 70

2. — *Transfer by a debtor to his wife.] A transfer by a debtor to his wife will be closely scrutinized, and the fact that she subsequently employed her husband as her agent in the business formerly transacted by him, is competent upon the question of fraud. Id.*

3. — *A single instrument of transfer "securing" two creditors, one fraudulent, the other not, sustained as to the latter.] A creditor who confessedly*

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held a valid claim against his debtor, knowing that his debtor was in embarrassed circumstances, and that his means of paying the debt rested largely in the plant and property which he owned, with a view to obtaining satisfaction of his debt, acting according to usual business impulses in such cases, treated with his debtor and finally reached a conclusion that he would take one-half the plant and property, offered in liquidation of the indebtedness to him, of his debtor, who assigned the other half to his wife, asserting that she was a just creditor to the extent of its value.

Held, that such transfer to the creditor was valid as against other creditors of the common debtor, although the latter was not in fact indebted to his wife, and that the transfer was void, as against his creditors, to the extent of the half transferred to her.

Semble, that it was not necessary that the creditor should believe that his debtor was indebted to his wife provided that the creditor's purpose was to obtain satisfaction of his own claim. *Id.*

4. — *Delay in the furnishing of the consideration of the transfer.*] The fact that the creditor did not at the time of the transfer, pursuant to the agreement made with his debtor, surrender to him all the evidences of his debt, consisting of notes, some of which had been discounted, and against all of which the creditor had agreed to protect the debtor, is not material, where it appears that the creditor carried out his agreement within a reasonable time. *Id.*

5. — *Payment — not effected by a transaction between the president of a bank and its debtor, also a creditor of the president, by which both debts are sought to be canceled.*] A transaction had between the president of a bank and the maker of a note held by the bank, who, as an executor, held a mortgage upon real estate belonging to the president of the bank, by which the debt of the president was to be offset against the moneys due the bank upon such note, followed by the debtor's satisfaction of the mortgage (which had never been held by or pledged to the bank), the president's return to the debtor of his note and the substitution therefor by the president, among the assets of the bank, of a forged note purporting to be that of the debtor, does not establish payment of the note — especially when taken in connection with proof of subsequent delay upon the part of the debtor, upon written demands by the bank for payment of the note, to assert that he had paid it. *DUNDEE NAT. BANK v. HUNTINGTON* 104

6. — *An attaching creditor, substituted to the interests of others, is liable to the sheriff for his fees.*] Where an attaching creditor of a company, by agreement with its other attaching creditors, is substituted to their interests, and his attorney, who is made the attorney of record in the actions brought by them, after settling all the attachments, directs the sheriff to release his levies and discontinues the several actions of the other creditors, the attaching creditor thus substituted becomes liable to the sheriff, by operation of law, for his fees in the actions so discontinued. *DUFFY v. BURTON* 51

— *A liquor tax certificate is a chose in action — it is assignable on demand as security for advances — a delivery not necessary — the assignment need not be filed — what laches do not impute fraud.*
See NILES v. MATHUSA 483

— *Corporation — annual report of a corporation verified by the president only, when sufficient — acceptance of a resignation not essential to its effectiveness.*
See NOBLE v. EULER 548

— *Creditors of a decedent cannot be paid the money realized in an action to partition his real estate until the debts are proved in the Surrogate's Court.*
See JOUFFRET v. LOPPIN 455

— *Mechanic's lien — payments made in good faith in advance of their becoming due — effect of the contractor giving a note to a sub contractor.*
See MILLER v. SMITH 507

— *Statutory references of a claim rejected by an administrator — how the defense of the Statute of Limitations must be presented.*
See FABURN v. DIMON 529

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— <i>Confession of judgment — insufficient statement of the cause of the indebtedness — an amendment not allowed as against another creditor.</i>	
<i>See BLACKMER v. GREENE.</i>	592
— <i>Confession of judgment — insufficient statement of the cause of the indebtedness — amendment of the statement allowed.</i>	
<i>See BRADLEY v. GLASS.</i>	200
— <i>Bills and notes — failure of consideration — fraudulent diversion — bona fide holder.</i>	
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DECISION — Of the court.

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DECLARATION — When competent as evidence.

See EVIDENCE.

DEED — *A conveyance of land bounded on a road transfers the title to its center line — effect of a grantor's reference to a map — an award for land taken should not be directed to be paid to the attorneys.]* 1. A deed executed in 1801 by the owner of the fee in a portion of the Bloomingdale road in the city of New York, conveyed lands, through which that road ran northerly, in two pieces and described the most westerly piece, lot No. 1, as running to the road and thence along it to lot No. 3, a lot lying directly south of it and abutting on the road. The description of the easterly lot No. 2 was in part "Beginning at the northwest corner of lot number four (also owned by the grantor, lying directly south of lot No. 2 and abutting on the road), opposite the southeast corner of lot number one on the east side of Bloomingdale road, and running thence north * * * along the road aforesaid to the land of James DePeyster," and the description, after giving other courses and distances, concluded, "thence north * * * along lot number four to the road and place of beginning."

The Bloomingdale road having been discontinued by statute, rival claims were presented upon the part of the heirs of the original owner and by persons claiming under his grantee, to an award, made by commissioners, to unknown owners of the land between the lots Nos. 1 and 2 in the road and which had been taken for the public use.

Held, that in view of the rule that where land is described as running to, and thence along, a road, whose fee is vested in the grantor, the center of the road is the boundary of the land conveyed, the persons claiming under the grantee in this case were entitled to the whole of the award, as the original grantor had conveyed the lands lying on both sides of the road and had not reserved the roadway; and that the fact that he had, in the deed, referred to a map which he had caused to be made of his lands, and which showed the road, did not prevent its bed from passing by the grant;

That the words "on the east side of Bloomingdale road," following the phrase "opposite the southeast corner of lot number one" in the description of lot No. 2, were not to be regarded as applying to lot No. 1, but merely as conveying a general description of lot No. 4;

That an order, directing the payment of an award made for lands taken for public use, should not contain a direction that the award be paid to the parties entitled thereto, or to their attorneys, as where such a payment is to be made to any one other than the owner of the fee, the payee should be required to present to the city officer making the payment a power of attorney duly executed and acknowledged by the person entitled thereto.

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DEED— *Continued.*

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2. — *Inconsistent statement in a description — a practical location for eighteen years will govern.*] Where a dispute arises between the owners of adjoining premises, claiming under deeds from a common grantor, as to the location of the division line, the description of which, in the older deed, presents inconsistencies which cannot be reconciled, the acts and declarations of the parties are competent upon the question as to the proper construction to be given to the conveyance, and the court may properly adopt a division line which has, for a period of eighteen years subsequent to the first conveyance, been marked by a retaining wall maintained by the owners between their lots. *PHILLIPS v. RITTER*. 34

DEFAULT— *Judgment by.**See* JUDGMENT.

— *Motion papers to open a default in pleading — they should contain a copy of the proposed answer.*

See MOTION AND ORDER.**DEFENSE**— *Of false representations.**See* PLEADING.

DEFINITION — “*Final decision*”—*what is a final decision within the meaning of the undertaking given to secure an order of arrest in a civil action for libel, that the plaintiff was “not entitled to the order of arrest.”*

See ALLAIRE v. KALFON. 546

— “*Electors*”—*as used in chapter 525 of 1888 authorizing the acquisition of lands for village park purposes.*

See SCOTT v. TWOMBLEY. 535

— “*Extraordinary expenditures*”—*what are — village bonds issued for.*

See ARVERNE-BY-THE-SEA v. SHEPARD. 13

DEMAND— *Conversion — necessity of a demand or a waiver thereof — proof of a refusal without demand made.*

See DELAHUNTY v. HAKE. 430**DEMURRER:***See* PLEADING.**DEPOSIT**— *In banks.**See* BANKING.

DEPOSITION — *Examination of the plaintiff before trial — objection that it will require the disclosure of facts constituting a crime.*] Where an order for the examination before trial of a plaintiff, bringing an action upon a promissory note, is based upon an affidavit of the defendant alleging that he will rely upon the defense of usury; that he is ignorant of the details of the transaction and of the facts necessary to be pleaded in connection therewith, and has no other means of ascertaining them, the plaintiff cannot successfully resist such examination by asserting that the examination will compel him to disclose facts which will constitute a criminal offense, where there is nothing in the record to show that the crime of usury, as defined by the statute, has been committed. *FOX v. MILLER*. 333

DESCRIPTION— *In a deed.**See* DEED.**DIRECTOR**— *Of a corporation.**See* CORPORATION.**DISCHARGE**— *Of debts.**See* PAYMENT.

DISCOVERY — *Inspection and discovery of the books of a deceased physician — when it will not be granted before trial where the books contain confidential statements of his patients.*] An order for an inspection and discovery of the books of a deceased physician, which contain records of privileged and confidential statements made to him by his patients, should not be granted on

DISCOVERY — *Continued.*

the alleged ground that they would show entries tending to prove that false representations as to the volume of his business had been made by the physician to the moving party, by which the latter was induced to enter into a contract with him, when it does not appear that all the information thus available may not be obtained from such books produced under subpoena at the trial.

LOWENTHAL v. LEONARD..... 330

DISCREDITING — *Witnesses.*

See WITNESS.

DIVORCE:

See HUSBAND AND WIFE.

DOCKET — *Of judgment.*

See JUDGMENT.

DOCTOR:

See PHYSICIAN.

DURESS — *Money had and received* — action by a grantor against a mortgagee who has required the purchaser to pay a sum (deducted from the purchase price) in excess of the amount due.

See LAWATSCHE v. COONEY..... 470

EJECTMENT — *Complaint* — allegations in ejectment joined with a statement that the defendant stretched wires over the land and a prayer that they be removed.

See PLUMMER v. GLOVERSVILLE ELECTRIC CO..... 527

ELECTION — *Polls at town meetings need not be kept open continuously from sunrise to sunset.*] 1. The provisions of the statute relative to town meetings (1 R. S. 342, § 18 [Chap. 569 of 1890]) do not require that town meetings shall be kept open, for the purpose of voting, continuously from sunrise to sunset, and such a meeting is not rendered illegal by the fact that the polls were not opened until nine o'clock in the forenoon, they continuing open, except for the noon hour, until sunset.

PEOPLE EX REL. VAN SICKLE v. AUSTIN..... 1

2. — *A town election board acts ministerially* — its acts are not reviewable by certiorari.] An objection of this character cannot be raised by a writ of certiorari issued to review the proceedings of the town election board, as its determination in the premises is not judicial in its character, and, in the absence of an allegation, in the petition for the writ, of some judicial action upon the part of the town election board, the court must assume that all its acts were ministerial and administrative, and, therefore, not reviewable by a certiorari issued under section 2120 of the Code of Civil Procedure. *Id.*

3. — *Election Law of 1896* — imperfect cross X mark — cross X mark to the left of a blank space not filled in with a name.] A ballot cannot be counted, under the Election Law (Chap. 909, Laws of 1896), where the elector has not placed a cross X mark in the voting space at the left of the name of a candidate, but has placed, in the column which is provided for the use of electors who wish to vote for persons not formally nominated, a cross X mark in the voting space at the left of the blank headed "For Trustee," no name being written under the latter words.

A ballot should be counted where the cross X mark placed in the circle at the head of a party ticket is not perfect and is something more than a cross X mark, as such a ballot comes within the provisions of section 114 of the act. PEOPLE EX REL. BANTER v. MORGAN..... 48

— *Municipal corporation* — "electors," as used in chapter 525 of 1888, authorizing the acquisition of lands for village park purposes.

See SCOTT v. TWOMBLEY..... 535

ELECTRIC LIGHT COMPANY:

See CORPORATION.

ELEVATOR — *Accident on.*

See NEGLIGENCE.

EMINENT DOMAIN — *Lands taken by statute for a city park — making subsequent changes therein, pending condemnation proceedings — mandamus.*

1. Where a statute (Chap. 56, Laws of 1894) declares certain described lands to be a park, provides a complete scheme for their condemnation and requires the city of New York to proceed at once to appropriate the lands to the public use, the rights of the parties must be deemed to have been presently fixed by the statute; and where it also appears that testimony has been given by both the owner and the city, in condemnation proceedings already taken, as to the value of a parcel of the land, as it was when the statute was passed, persons having a permit or license from one of the owners of the land to dump earth upon it (a proceeding detrimental to the land as a park, and increasing the subsequent expense of adapting it to park purposes) are not entitled to a writ of peremptory mandamus compelling the city commissioner of public works to grant them a permit to cross the adjacent sidewalk with carts and trucks in order to fill the land. The right to a writ of mandamus is not an absolute one. *PEOPLE EX REL. CANAVAN v. COLLIS*. 341

2. — *Action against an elevated railroad for rental damages — examination of witnesses as to rental values of specific properties, allowable only on cross-examination.*] Where the evidence given upon the part of abutting owners, in an action brought by them to recover rental damages resulting from the maintenance and operation of an elevated railroad in the city of New York, is confined strictly to showing, by persons competent to speak, the general course and current of values, the defendant is entitled to cross-examine such witnesses as to particular properties and as to their rental history, but it is not entitled to examine, subsequently, and as a part of its own case, its own witnesses in chief as to the rental history of specific properties situated in the same streets as to which it had already cross-examined the witnesses of the plaintiffs.

O'SULLIVAN v. NEW YORK ELEVATED R. R. Co. 384

3. — *Elevated railroads — basis for injunctive relief.*] Where an elevated railroad is constructed upon a public street, an abutting owner is only entitled to relief by injunction for the invasion of his easements of light, air and access to the premises from the street.

EMIGRANT MISS. COM. v. BROOKLYN EL. R. R. Co. 596

4. — *Damages to easements from ashes and cinders which fly from a dumping ground into the windows of a house are recoverable as past or rental and not as fee damages.*] Injury resulting from the fact that the elevated railroad owns land adjoining the premises in question on both sides and in the rear, and although given no specific legislative authority to do so, locates its yard and dumping ground thereon, from which ashes and cinders fly into the abutting owner's windows when they are opened, is allowable as past or rental damages only, but not as fee damage. *Id.*

5. — *Reference in a statute to a map — 1892, chap. 114.*] Where a statute definitely refers to a map by its date and the date of its filing in a public office, the fact that the statute incorrectly designates the commissioners by whom the map was made is of no importance. *MATTER OF THE MAYOR*. 856

6. — *Attaching additional sheets to a map after it has been filed.*] Where two sheets, purporting to contain corrections of clerical errors in a map, are inserted in it, after filing and without the authority of, and unsigned by, the commissioners by whom the map was made, the new sheets are not a part of the map. *Id.*

— *Contempt of court — where a railroad fails to obey a judgment requiring it either to remove an obstruction or to condemn land — appeal.*

See RAY v. NEW YORK BAY EXTENSION R. R. Co. 539

— *An award for land taken should not be directed to be paid to the attorneys.*

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EMPLOYER AND EMPLOYEE:

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EQUITABLE LIEN:

See LIEN.

EQUITY — *Foreclosure — redemption by a junior incumbrancer not made a party — redemption allowed without a resale — costs against purchasers who resist a redemption.*
See NAYLOR v. COLVILLE..... 581

ESTATE — *In real property.*
See REAL PROPERTY.

ESTOPPEL — *Fire insurance — where the adjuster of the company denies all liability, the insured need not furnish proofs of loss.*
See FLAHERTY v. CONTINENTAL INS. CO..... 275

— *When an agreement of compromise of differences does not constitute an estoppel.*
See HAZLETON v. WEBSTER... 177

EVIDENCE — *Testimony as to a statement by the counsel of a corporation (made at a date subsequent to a settlement) as to the terms of such settlement, not admissible as against the corporation.] 1. Upon the trial of an action brought against a railroad corporation to recover for services rendered by a firm of attorneys in the compromise of certain actions, the question was presented as to whether, by the terms of a settlement made on April 4, 1896, compensation for such services was included in a sum paid to the firm under such settlement. The firm proved by one Collin, an attorney, who together with one Lewis, at the time of the settlement, represented the railroad, that at a meeting held in July, 1896, between the parties who had conducted the settlement, a memorandum was produced by Lewis which was stated by him to have been made at the time of the settlement, which recited that the firm was to be paid the reasonable value of the services to be rendered by it in the compromise of the cases.*

Held, that as, at the time of the reading of the memorandum, Lewis was not acting in the discharge of any duty which he owed to the railroad in respect to the settlement of the claim, his declarations made at that time were inadmissible against the railroad, and that testimony as to the contents of the memorandum was inadmissible.

MORRIS v. BROOKLYN HEIGHTS R. R. Co..... 557

2. — *Proof that a "flash" was caused by touching an iron brace with a wire.] A witness may testify that a flash of light was occasioned by the touching of a wire to the iron brace attached to a telegraph pole — such testimony is the statement of a fact, not the expression of an opinion.*

DWYER v. BUFFALO GENERAL ELECTRIC Co..... 124

3. — *Life insurance — proof as to restrictions in a foreign statute.] The question as to the validity, under the laws of another State, of a policy of insurance claimed to be in violation thereof, presents a question of fact which must be established by proof.*

RAND v. MASSACHUSETTS BENEFIT LIFE ASSN..... 392

4. — *Discrediting testimony elicited from the adverse party.] A party, upon whom it is incumbent to prove an alleged fact, cannot call his adversary as a witness to prove it, and, after eliciting from him testimony to the effect that such alleged fact has no existence, then call upon the jury to discredit such testimony simply because such witness is interested as a party, and thus base upon the assumed falsity of his testimony an affirmative finding of the existence of such alleged fact, without other evidence thereof or evidence from which it can be inferred.* KIRBY v. D. & H. C. Co..... 478

5. — *Contradicting a witness by proof of his own statements.] Where a witness has testified upon a subject which is material to the issue, it is competent to prove prior declarations made by him which were inconsistent with and contradictory of his testimony given upon the trial, even though the impeaching evidence may incidentally have some bearing upon the main question.* MAHER v. N. Y. CENTRAL & H. R. R. R. Co..... 161

— *Aron — a priest, by his servants, burning a parochial school building to get the insurance — evidence as to his relations with his servants — his insolvency — a telegram sent to a servant on the day before the fire — the accused should account for his whereabouts — res gestæ of the flight of an accomplice — acts of*

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insurance agents applied to for insurance — admissions of accused that he could not get property insured in his own name — demand after a loss that moneys be paid to the trustees of his church and not to the bishop — letter of his bishop charging the priest with "public drunkenness" — motive for arson — charge as to the failure of the accused to testify.

See **PEOPLE v. FITZGERALD** 139

— Arson — facts not constituting one an accomplice as matter of law — necessity of a criminal intent, which must be found as a matter of fact — proof of a fire in a neighboring city, which was a part of the same plot, is admissible in corroboration of the testimony of an accomplice.

See **PEOPLE v. ZUCKER** 363

— Statute of Frauds — it must be pleaded — waiver of the objection that it is not — proof, without objection, of an oral contract not to be performed within one year — an amendment of the answer, setting up the statute, changes the defense.

See **LUPEAN v. BRAINARD** 212

— A judgment roll is evidence for what parties an attorney appeared as bearing on his claim for compensation from others — his own acts, but not the decision of others, may be shown on the cross-examination of a prisoner to discredit him.

See **PEOPLE v. DORTHY** 308

— Negligence — opinions of physicians as to the permanency of injuries — statement by the party injured that he has since been unable to work — questions directed to the credibility of a witness.

See **CASS v. THIRD AVENUE R. R. Co.** 591

— Action against an elevated railroad for rental damages — examination of witnesses as to rental values of specific properties, allowable only on cross-examination.

See **O'SULLIVAN v. NEW YORK ELEVATED R. R. Co.** 384

— Inspection and discovery of the books of a deceased physician — when it will not be granted before trial where the books contain confidential statements of his patients.

See **LOWENTHAL v. LEONARD** 330

— A county clerk cannot be allowed by the board of supervisors for money paid to his assistants in assorting jury slips — proof required under the County Law that the money was necessarily expended.

See **MATTER OF WALSH v. SUPERVISORS** 489

— Negligence — failure of the master to have a machine oiled, resulting in its becoming unmanageable and cutting off an employee's fingers — proof making the master's liability a question for the jury.

See **PRESCOTT v. OTTMAN LITHOGRAPHING CO.** 397

— Negligence — a person killed at a railroad crossing where there were no eye-witnesses — inferences as to negligence and contributory negligence.

See **NOBLE v. N. Y. CENTRAL & H. R. R. Co.** 40

— Negligence — testimony of a physician as to the permanency of injuries and their probable effect — contradicting a witness by proof of his own statements.

See **MAHER v. N. Y. CENTRAL & H. R. R. Co.** 161

— Failure to insert the date in a verification — presumption that a petition in a summary proceeding was verified before the precept was issued.

See **GRIFFIN v. BARTON** 512

— Independent collateral oral agreement between an insurance company and its general agent — it may be proved although the contract of agency is in writing.

See **STOWELL v. GREENWICH INS. CO.** 188

— Slander — privileged communications — words of a store manager, informed of a theft, spoken to the accused — the accused must show express malice.

See **MCCARTY v. LAMBLEY** 264

— Rule of construction — instruments executed about the same time, not construed together when they relate to different properties.

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- *Agreement to indemnify a bank for thefts of its secretary—parol evidence as to the meaning of the agreement.*
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EXAMINATION — *Of a party before trial.*

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EXECUTION — *A judgment for the plaintiff in an action of conversion—when it is reversed, with costs, upon an appeal, the defendant is entitled to an execution against the person of the plaintiff.] A complaint in an action which alleges that, after the defendant had assigned to, and agreed to collect for, the plaintiff a sum due the defendant from a corporation, he wrongfully collected it and converted it to his own use, states a cause of action justifying an order of arrest under subdivision 2 of section 2895 of the Code of Civil Procedure, and the issue of an execution against the person of the defendant upon any judgment recovered therein; and where such a judgment in favor of the plaintiff is reversed upon an appeal, with costs, the defendant is entitled to issue upon the judgment for costs an execution against the person of the plaintiff. KNAPP v. MURPHY..... 83*

— *Liquor Tax Law of 1896—a liquor tax certificate cannot be levied upon under an execution.*
See MCNEELEY v. WELZ..... 566

— *Pension money—invested in real estate—transfer thereof in fraud of creditors.*
See FRITZ v. WORDEN 241

EXECUTOR AND ADMINISTRATOR — *Claims against the estates of decedents should be closely scrutinized.] The evidence in support of a claim made against the estate of a decedent should be closely scrutinized.*

A claim based upon an alleged loan claimed to have been made by a sister to her deceased brother, rejected, where there was no written evidence

EXECUTOR AND ADMINISTRATOR — *Continued.*

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to sustain the claim, and there was proof tending to show that the loan was, in fact, an advance made by her to her father, in conjunction with a similar advance made to him by her brother, in order to enable the father to procure the satisfaction of a mortgage which he had given. *O'NEILL v. BARRY*..... 121

— *Legacies cannot be paid from the proceeds of realty unless charged upon it — creditors of a decedent cannot be paid the money realized in an action to partition his real estate until the debts are proved in the Surrogate's Court.*

See JOUFFRET v. LOPPIN..... 455

— *The Statute of Limitations is a defense at law — it will not be considered in an action to construe a will — surrogate to determine as to the payment of legacies.*

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— *Statutory reference of a claim rejected by an administrator — how the defense of the Statute of Limitations must be presented.*

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FALSE REPRESENTATION — *Executory contract of sale — recovery of the money paid on the delivery of the goods on the ground that they were not as they were represented to be.*

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— *Money had and received*— action by a grantor against a mortgagee who has required the purchaser to pay a sum (deducted from the purchase price) in excess of the amount due.

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— *Default*— not opened where the party has deceived the court.

See RANDELL v. NAT. RIVET & NOVELTY CO. 388

— *What laches do not impute fraud.*

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FRAUDULENT CONVEYANCE— *Transfer of property by a husband to his wife.*] A transfer by a debtor to his wife will be closely scrutinized, and the fact that she subsequently employed her husband as her agent in the business formerly transacted by him, is competent upon the question of fraud. *COMMERCIAL BANK v. BOLTON.* 70

— *A single instrument of transfer "securing" two creditors, one fraudulent, the other not, sustained as to the latter.*

See COMMERCIAL BANK v. BOLTON. 70

— *Pension money*— invested in real estate— transfer thereof in fraud of creditors.

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— *Chattel mortgage*— when not shown to be fraudulent as to creditors.

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FURNACE— *When furnaces and ranges are fixtures*— a lien may be supported for labor and materials used in setting such furnaces and ranges.

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GIFT— *Gift inter vivos*— a savings bank book in account with the depositor and a third person— right of the third person to whom the book is delivered— when the transfer is not conditional— a savings bank account "in trust"— subsequent drafts by the depositor.

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— *Negligence*— injury from driving into a pile of planking left unlighted at the approach to a canal bridge— liability of a railroad company for the act of an independent contractor laying its rails on the bridge.

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HUSBAND AND WIFE—*Action by a wife to restrain a woman from holding herself out as the lawful wife of the plaintiff's husband — insufficiency of the complaint — the case is not within the Penal Code, § 562.* 1. A complaint in an action which, after alleging that the plaintiff is the lawful wife of Frederick Hodecker, states that the defendant resides with him and that, although never married to him, she has in various ways falsely personated herself as, and claimed to be, his lawful wife, although well knowing that the plaintiff is his true and lawful wife, not accompanied by any allegation that the plaintiff has suffered any pecuniary damage, but that she has been scandalized, slandered, defamed, annoyed, humiliated and degraded, and otherwise injured to her damage of \$10,000, does not state a cause of action, nor do the facts alleged constitute a crime, under section 562 of the Penal Code, providing, among other things, that "a person who falsely personates another, and in such assumed character marries, or pretends to marry, or to sustain the marriage relation towards another, with or without the connivance of the latter, shall be punishable by imprisonment in a State prison for not more than ten years," as the complaint does not allege that, before marrying or pretending to marry, or prior to sustaining the marriage relation with Frederick Hodecker, the defendant falsely personated the plaintiff, the allegations in question merely amounting to a statement that the defendant has held herself out to the world as Mrs. Frederick Hodecker, conduct which, although morally indefensible and false in fact, does not bring the case within the statute.

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2. — *An ante-nuptial contract made in a foreign State—when a bar to a tenancy by the curtesy.* An ante-nuptial contract, executed in 1876 in the State of Connecticut, by the terms of which a husband agrees that he "will not claim to have or pretend to have any right or interest in or to any part of her (his wife's) said estate or of said income, but will permit the same to pass by her will to her devisees, or by descent to her heirs at law, as the same would pass if she had remained single and unmarried," is valid, and constitutes a bar to any tenancy by the curtesy upon the part of the husband in the lands of the wife in the State of New York. WHITE v. WHITE. 560

3. — *A possessory action by the heir entertained in equity.* Where no proper objection thereto is made upon the trial, a court of equity will entertain an action, in form one of ejectment, brought, at the instance of the guardian of the property of the sole infant heir of the wife, to enforce the ante-nuptial agreement and to compel the husband to surrender possession of the wife's estate. *Id.*

4. — *Demand of possession by letter.* In such a case the failure of the husband to reply to a letter written to him by the guardian demanding possession of the premises, is sufficient to sustain a finding of unlawful possession by the husband. *Id.*

5. — *The contract inures to the benefit of the wife's devisee or heir — legal privity unnecessary.* The rule that legal privity must exist between the promisee and a third party in order to enable the latter to sue upon a promise alleged to have been made for his benefit, does not apply to ante-nuptial contracts or to agreements of a similar nature. Such an ante-nuptial contract must be regarded as made for the benefit of any person to whom the wife's property passes by devise or descent. *Id.*

6. — *Reservation in a decree of divorce of the right to apply for alimony.* Unless a provision for alimony is contained in the final judgment in an action for divorce it cannot be awarded by a subsequent order, but where such a judgment contains a provision that the plaintiff "may apply at the foot of this judgment, as she may be advised, for such other provision, touching an allowance or otherwise, as any change in the circumstances of the parties may require," the court may thereafter make a provision for her support when it is shown that the defendant's circumstances have changed since the decree of divorce was entered. NOBLE v. NOBLE..... 395

7. — *Charging a husband with necessities furnished to his wife—a subsequent letter of the wife is inadmissible.* Where an action is brought to charge a

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husband with necessaries alleged to have been furnished by the plaintiffs to his wife, a letter written to them by the wife, after the purchases had been made, asking them to "look to" her husband and not to herself for the payment of the bill, is inadmissible, both as being a mere declaration of the wife not connected with the purchase or delivery of the goods, and as being insufficient to show, as against the husband, any delivery of the goods.

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8. — *A contract by a husband to furnish to his wife proof of his adultery, to enable her to procure a divorce, is unenforceable.*] Where a contract made by a husband with his wife (subsequently divorced) to pay to her a certain sum semi-annually, appears to have been part of a larger agreement whereby the husband was to assist his wife to procure an absolute divorce from him by furnishing to her proof of his past adultery and thereby to enable her to marry another person, the contract cannot be enforced.

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9. — *Transfer of property by a husband to his wife.*] A transfer by a debtor to his wife will be closely scrutinized, and the fact that she subsequently employed her husband as agent in the business formerly transacted by him, is competent upon the question of fraud.

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ICE — *Action to restrain ice cutting injurious to a mill property upon the outlet of a lake — title of riparian owners upon a non-navigable lake — acts of parties giving a practical construction to an agreement — consideration therefor — reasonable use of the waters of a lake in cutting ice from it — estoppel.*] The owners of a mill lot, situated upon the outlet of an inland, non-navigable lake, not being themselves riparian owners, obtained from the riparian owners of lands upon such lake, grants which permitted the mill lot owners, who had raised the height of their dam upon the outlet, to flow thereby so much of the lots of the riparian owners "as is now flowed by said dam and to keep the same so flowed" as long as the water is used to propel machinery.

A subsequent grantee of the mill lot, finding his supply of water reduced by reason of the ice cut by certain riparian owners upon the lake, brought an action to prevent their continuing to cut the ice, and thereafter, in a settlement of such action, entered into an agreement with them by which he, for a sum to be paid him for each ton of ice cut, conveyed to them a strip of land which adjoined their property and also granted to them the right to cut, and released them from any damages arising from their cutting, the ice from the lake, and thereafter such riparian owners, with the apparent acquiescence of the owner of the mill lot, cut and removed ice from the lake without any restriction as to quantity.

Held, that the agreement was a grant and not a mere license;

That a subsequent grantee of the mill lot could not maintain an equitable action to restrain these riparian owners from cutting the ice.

Quære, whether the fact that the agreement provided that it should not "be deemed to grant the exclusive right" to the persons thus cutting ice "to cut, take and remove ice from said lake," and that it should not affect the right of the owner of the mill lot to claim damages against any other parties, operated as a limitation upon the estate granted.

That even were there doubt as to the meaning of the agreement, the acts of the parties gave it a practical construction;

That, moreover, the grantor of the mill lot not being a riparian owner upon the lake, had no right to the ice in it, it being the case of an inland and non-navigable body of water as to which the law presumes that a riparian owner owns to the center;

That the agreement being under seal, a presumption of a consideration arose therefrom, and the further fact that it bore unmistakable evidence of mutuality, and that the instrument was executed in settlement of a disputed claim, also afforded an adequate consideration;

That the riparian owners upon this inland, non-navigable lake had the right to use its water and cut its ice, but that such use must be reasonable, and must not damage the mill owner located upon the outlet of the lake;

That by entering into the agreement and thus compromising their differences with the mill owner, the riparian owners simply admitted that by

ICE — *Continued.*

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taking the quantities of ice from the pond which they did, they were making such an unreasonable use or appropriation of its waters as rendered it desirable for them to buy their peace, and that the agreement was not such a recognition of the mill owner's right to the ice as estopped them from disputing his title thereto. *HAZLETON v. WEBSTER*..... 177

IMPEACHMENT — *Of witnesses.**See* WITNESS.

IN FORMA PAUPERIS — *Payment of the costs of a former action and security for future costs, not required.*

See ROSA v. SECOND AVENUE R. R. Co..... 334**INCORPORATION :***See* CORPORATION.

INDEMNITY — *Agreement to indemnify a bank for thefts of its secretary — when "indebtedness" covers his own thefts and those of his subordinates occurring by his connivance or negligence — parol evidence as to the meaning of the agreement — interest.]* Upon the discovery of thefts committed by the secretary of a savings bank, both while holding that office and previously while acting as one of the clerks of the bank, and of thefts by other of its employees, subordinate to him and which occurred through his connivance or negligence, the secretary of the savings bank gave to a third person, for its benefit, an agreement made part of, and at the same time with, a mortgage executed by him to secure its obligations, which agreement, after stating that he was indebted to the bank in an amount uncertain, but to be ascertained by investigation within twelve months, contained a condition that if any "indebtedness" from him to the bank should be found to exist, he would pay it with lawful interest, or, in the alternative, that the mortgage should be availed of.

Held, that proof that, at an interview had between him and the bank officials and which led to the execution of the instruments in question, he, after having been charged with being liable for the whole deficiency, a sum much greater than that which he was willing to admit, finally agreed to make good any deficiency for which he was responsible "directly or indirectly," was admissible;

That the bank was entitled to recover, upon a foreclosure of the mortgage, under the word "indebtedness" and upon proper proof, not only the personal debt of the secretary to it, but also the sum taken from it, with his connivance or through his negligence, by the clerks who were subordinate to him, together with lawful interest thereon from the time when his obligation to the bank accrued. *LATIMER v. VEADER*..... 418

— *Bond of indemnity.*

See BOND.

INDICTMENT — *Larceny — an indictment charging the offense in the terms of the statute, is sufficient.*

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INJUNCTION — *Action to restrain ice cutting injurious to a mill property upon the outlet of a lake — title of riparian owners upon a non-navigable lake — acts of parties giving a practical construction to an agreement — consideration therefor — reasonable use of the waters of a lake in cutting ice from it — estoppel.*

See HAZLETON v. WEBSTER..... 177

— *Action by a wife to restrain a woman from holding herself out as the lawful wife of the plaintiff's husband — insufficiency of the complaint — the case is not within the Penal Code, § 562.*

See HODECKER v. STRICKLER..... 245

— *Elevated railroads — basis for injunctive relief — damages to easements from ashes and cinders which fly from dumping ground into the windows of a house are recoverable as past or rental and not as fee damages.*

See EMIGRANT MISSION COM. v. BROOKLYN EL. R. R. Co..... 596**INJURY :***See* NEGLIGENCE.

INN KEEPER — *Sale of intoxicating liquor by.*
See INTOXICATING LIQUOR.

INSOLVENCY:
See BANKRUPTCY.

INSPECTION — *Of books and papers.*
See DISCOVERY.

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INSURANCE — *Independent collateral oral agreement between an insurance company and its general agent — it may be proved although the contract of agency is in writing—interference with the sub-agents and the business of the general agent, when the agency ends.]* 1. A written agreement was made between an insurance company and a party about to act as its general agent in work requiring the appointment by him of sub-agents, which provided, among other things, "that this contract may be terminated at any time by either party giving ninety (90) days' notice thereof, and without any liability on the part of the said Company beyond the commission aforesaid actually earned" at the closing up of said agency; pursuant to which provision the contract was terminated by the company.

It was claimed by the agent that contemporaneously with the execution of the written agreement, he and the company made another agreement, which, although not reduced to writing, was collateral and supplementary to it, and was made as a condition of his acceptance of the written agreement, to the effect that, in case of the written agreement being terminated, the company would not interfere with his sub-agents or business.

When the written contract was terminated by the company it endeavored to retain in its service all the sub-agents appointed by the general agent and to avail itself of the business secured by them.

In an action brought by the agent to recover damages resulting from such breach of the oral agreement,

Held, that the oral agreement was collateral to and independent of the written one and was enforceable. *STOWELL v. GREENWICH INS. CO.*..... 188

2. — *Damages may be recovered although difficult of ascertainment and speculative.]* The fact that damages are difficult of accurate ascertainment, and that a jury must, to some extent, speculate as to their amount, cannot relieve a party in default on his contract from liability thereon. *Id.*

3. — *An action for the specific performance of an insurance contract — failure of the company to create and divide a reserve fund — a policyholder cannot sue for specific performance.]* A mere policyholder of an assessment life insurance company cannot maintain an action against it in his own behalf and in that of other policyholders for the specific performance of a contract, contained in his policy, under the terms of which the company agrees to create and maintain, from its net earnings, a reserve fund, and to divide among the policyholders the surplus of that fund above a given amount, the complaint alleging that the company has failed properly to create and maintain the fund, and also that it has diverted its net earnings to other purposes, as such allegations, in effect, charge misconduct against its officers and directors, require something in the nature of an accounting by the company, and the action, if successful, will compel it to change its present method of conducting business. *SWAN v. MUT. RESERVE FUND LIFE ASSN.* 255

4. — *The action lies against the officers and not the corporation only.]* An action having such a scope is, if maintainable, within sections 1781 and 1782 of the Code of Civil Procedure, and must be brought against the officers of the insurance company, and not against the company only. It is also within section 56 of the Insurance Law (Chap. 690, Laws of 1892), providing that proceedings for an accounting by a domestic insurance corporation can be taken only upon the application or approval of the Attorney-General, except in an action by a judgment creditor or in proceedings supplementary to execution; and it follows that only the Attorney-General or a judgment creditor of the company may bring the action. *Id.*

5. — *Constitutional law.]* Such a construction of the statute does not impair the obligation of the contract made between the company and its policyholders, in violation of section 10 of article 1 of the Constitution of

INSURANCE — *Continued.*

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the United States, as the statute is remedial only and prescribes a method of procedure by which the remedy may be made applicable to every person situated as is the policyholder in question. *Id.*

6. — *Co-operative town insurance company — continued location of property insured.*] In the absence of special restriction, clothed in clear and unequivocal language, as to the territory within which property is to continue to be insured, the parties will be deemed to have contemplated that the property may be used in the ordinary way, and that, while thus used, the insurance shall attach to it wherever the property may be while the owner is using it in a customary way. *EDDY v. FARMERS' MUT. INS. CO.* 109

7. — *A trotting horse, insured in one county by a co-operative town insurance company, destroyed by fire in another where he was being trained.*] A policy of insurance, covering a trotting stallion, issued in the county of Niagara by a co-operative town insurance company authorized to do business only in the counties of Orleans and Niagara, in the application for which insurance the stallion is not stated to be in any building or any particular place, nor restricted by the policy from temporary or permanent removal by its owner from the county of Niagara, and to the knowledge of the company's agent, when the policy was issued, was expected to be trained subsequently in the city of Buffalo for racing, and which was destroyed by fire in said city of Buffalo, does not in terms constitute a violation by the company of the provisions of section 12 of chapter 573 of the Laws of 1886, forbidding the issue of a policy on "property out of the limits of the territory;" nor is it an infraction of section 278 of chapter 38 of the Laws of 1892, as amended by chapter 907 of the Laws of 1896, forbidding such a company to "transact business" beyond the territorial limits mentioned in its certificate of incorporation. *Id.*

8. — *Life insurance — waiver of non-payment of premiums — inference that a member has been reinstated.*] Where a policy of insurance has lapsed because of a failure by the insured to make the required payments for a period of four weeks, and an application by the insured for reinstatement is received by the insurer and is not returned by it, and it subsequently accepts weekly premiums which exceed in amount the premiums due at the death of the insured, a waiver of the non-payment of the premiums for such period of four weeks may be inferred.

In such a case the insurer is put to proof of the fact that the member had not been reinstated — particularly where its denial of a reinstatement is made upon information and belief.

BRADLEY v. JOHN HANCOCK MUT. LIFE INS. CO. 22

9. — *Proofs of death are not conclusive as to the cause of death.*] Proofs of death are only *prima facie* evidence of the cause of death. *Id.*

10. — *Effect of moving for the direction of a verdict.*] After moving for the direction of a verdict, the insurer cannot insist, where he fails thereafter to ask that a question of fact be submitted to the jury, that there was conflicting evidence which should have been submitted to the jury. *Id.*

11. — *Appraisal under the New York standard policy — duty of the umpire.*] The provisions of the New York standard fire insurance policy, to the effect that if the appraisers fail to agree they "shall submit their differences to the umpire," require the latter to examine and consider the estimate of the appraiser for each party in arriving at his determination, and where it appears that he acted in a hasty and perfunctory manner and listened only to the statement made by the insurer's appraiser, there is proof of legal misconduct upon his part sufficient to require a court of equity to set aside the award.

STROME v. LONDON ASSURANCE CORP. 571

12. — *An award not set aside for mere inadequacy.*] Inadequacy, pure and simple, in an appraisalment under the New York standard fire insurance policy, is not a ground for setting it aside. *Id.*

13. — *Inadequacy considered as bearing upon the question of corruption or partiality.*] *Quare*, whether an award may not be so small as to indicate, when viewed in connection with other circumstances in the case, the existence of partiality or corruption. *Id.*

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14. — *An insurer's offer of compromise is inadmissible.*] *Semble*, that evidence of what an insurance company offered to pay to compromise a loss is inadmissible. *Id.*

15. — *Fire insurance, Lloyds system — an action must be brought against the attorney of the underwriters alone — actions cannot be brought, in the first instance, against all the underwriters.*] A stipulation, contained in a fire insurance policy issued under the Lloyds system, providing that no action shall be brought to enforce the policy except against the attorney of all the underwriters, himself one of them, they agreeing to abide the result of such single action as fixing their individual responsibility, is valid, and several actions cannot be brought upon the policy, in the first instance, against the several underwriters individually.

Such a provision does not oust the court of jurisdiction, and is in avoidance of a multiplicity of actions, the merits of any controversy in reference to the policy being finally determined as to all the underwriters in such action against the attorney. *LAWRENCE v. SCHAEFER*..... 80

16. — *Life insurance — the beneficiary may introduce in evidence proof of death.*] Where a policy of life insurance requires the submission to the insurance company of proofs of death, the beneficiary may, in an action on the policy, introduce them in evidence in order to show compliance with the requirements of the policy. *PICKETT v. METROPOLITAN LIFE INS. CO* 114

17. — *Application signed by another for an insured person who could not write.*] Where the agent of a life insurance company is informed that the insured cannot write, and his sister, by his request, signs his name to the application for insurance, the company cannot subsequently resist payment of the policy upon the ground that the application was not in fact signed by the insured. *Id.*

18. — *Fire insurance — where the adjuster of the company denies all liability, the insured need not furnish proofs of loss.*] The declaration of an agent, appointed by an insurance company to adjust a loss occurring under a New York standard policy of fire insurance, made to the insured, to the effect that the company was not liable at all in the matter because of the invalidity of a vacancy permit, the premises having been unoccupied at the time of the fire, excuses the insured from furnishing the proofs of loss required to be furnished by the policy. *FLAHERTY v. CONTINENTAL INS. CO.*..... 275

19. — *Estoppel.*] In such a case the company is estopped from setting up, as a defense to an action upon the policy by the insured, provisions of the policy requiring that none of its conditions shall be waived except by a written agreement indorsed thereon or added thereto. *Id.*

20. — *Life insurance — reinsurance of the risks of another company not within the prohibition of the statute forbidding the taking of risks on lives of over sixty years.*] *Quere*, whether a statutory provision which forbids a benefit life insurance association to take risks on the lives of persons over sixty years of age, applies to the case of the reinsuring of the risks of another insurance company.

The recovery of premiums paid on such a policy, on the ground that they were paid without consideration, not sustained where there had been a default of payment forfeiting the policy.

RAND v. MASSACHUSETTS BENEFIT LIFE ASSN. 393

21. — *Proof as to restrictions in a foreign statute.*] The question as to the validity, under the laws of another State, of a policy of insurance claimed to be in violation thereof, presents a question of fact which must be established by proof. *Id.*

— *Arson — a priest, by his servants, burning a parochial school building to get the insurance — evidence as to his relations with his servants — his insolvency — a telegram sent to a servant on the day before the fire — the accused should account for his whereabouts — res gestæ of the flight of an accomplice — acts of insurance agents applied to for insurance — admissions of accused that he could not get property insured in his own name — demand after a loss that moneys be paid to the trustees of his church and not to the bishop — letter of his bishop*

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charging the priest with "public drunkenness" — motive for arson — charge as to the failure of the accused to testify.

See *PEOPLE v. FITZGERALD* 139

— Money had and received — contract by the directors to turn over the control of an insurance corporation to a party paying therefor — an action does not lie against them by its receiver for money received.

See *McCLURE v. LAW* 459

— Money paid for a sale of the control of an insurance corporation — it cannot be followed by its receiver into the hands of the holder of an invalid obligation of the corporation.

See *McCLURE v. TRASK* 466

INTERSTATE COMMERCE — *Interstate Commerce* — an ordinary scrub brush, made by convict labor in Ohio and not branded to that effect, may, notwithstanding chapter 931 of 1896, lawfully be possessed and sold in the State of New York — limits of the police power of a State.

See *CONSTITUTIONAL LAW*.

INTOXICATING LIQUOR — A liquor tax certificate is a chose in action — it is assignable on demand as security for advances — a delivery not necessary — it need not be filed.] 1. A liquor tax certificate, issued under the provisions of chapter 112 of the Laws of 1896, having, by statute, a surrender value, passing to personal representatives and being assignable upon certain terms to any corporation, association, copartnership or individual not forbidden to traffic in liquor, must be deemed to be a chose in action; as such it is assignable without delivery to a corporation which has advanced moneys to the licensee in order to enable him to procure the certificate, and such assignment need not be recorded as a chattel mortgage in order to make it valid as against creditors of the licensee.

Where the agreement made is to assign the certificate to the corporation on demand, the demand may be made at the time that an application is made by a judgment creditor of the licensee to procure in supplementary proceedings the appointment of a receiver of his property. *NILES v. MATHUSA* 488

2. — *What laches do not impute fraud.*] A delay of some seven months, in making a demand of the licensee that he assign the liquor tax certificate, does not establish laches, amounting to fraud as against the creditors of the licensee. *Id.*

3. — *Liquor Tax Law of 1896* — a liquor tax certificate cannot be levied upon under an execution.] A liquor tax certificate issued under chapter 112 of the Laws of 1896 and a surrender receipt therefor are, neither of them, evidences of debt upon which the Code of Civil Procedure, section 1411, authorizes an execution to be levied. *MCNEELEY v. WELZ* 566

4. — *Construction of a chattel mortgage of a license and its "renewal."*] A chattel mortgage given May 15, 1896, which covers "the right of the mortgagor to a license to sell beer or to a renewal thereof," embraces a liquor tax certificate subsequently issued in renewal of the license under chapter 112 of the Laws of 1896. *Id.*

5. — *What will be construed to be an action to foreclose it.*] A complaint in an action brought to procure a determination as to the mortgagee's rights to the amount of the rebate on the surrender of the liquor tax certificate, considered to be an action to foreclose the mortgage and consequently to bring the subject-matter of the action within equitable cognizance. *Id.*

6. — *Costs against a defendant claiming to have an interest.*] What is sufficient to show that a defendant claimed an interest in the subject of the action, and consequently to entitle the plaintiff to costs as against such defendant. *Id.*

IRREGULARITY — *In a judgment — the remedy is by motion and not by an appeal.*

See *JUDGMENT*.

ISSUES — *Trial of.*

See *TRIAL*.

JEW — *The inadvertent service of a summons upon a Jew on Saturday is not a misdemeanor and the process is valid.*

See PROCESS.

JOINDER — *Of parties.*

See PARTY.

JUDGE'S CHARGE — *To the jury.*

See TRIAL.

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JUDGMENT — *Confession of judgment — insufficient statement of the cause of the indebtedness.*] 1. A judgment by confession, in which the statement of the indebtedness is to the effect that the debt and liability were justly due to the plaintiff, being "for a balance due for goods, wares and merchandise sold and delivered to me, Fred C. Greene, by plaintiff, William W. Blackmer, and remaining unpaid and unsecured," does not comply with the requirements of section 1274 of the Code of Civil Procedure, and will be set aside on the application of another creditor of the common debtor.

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2. — *An amendment not allowed as against another creditor.*] As against such other creditor, an amendment of the statement will not be allowed. *Id.*

3. — *Confession of judgment — insufficient statement of the cause of the indebtedness.*] A confession of judgment whose statement alleges that the debt is "for goods sold and delivered to me by plaintiffs prior to the date hereof, and that said goods were sold and the payment thereof became due as aforesaid," is insufficient under subdivision 2 of section 1274 of the Code of Civil Procedure, as it does not show what the goods were, nor when or where they were sold, nor what was their value.

BRADLEY v. GLASS..... 200

4. — *Amendment of the statement allowed.*] The insufficiency of such a statement appearing to be the result of inadvertence rather than of design, the court considered that an amendment thereof should be permitted upon reasonable terms. *Id.*

5. — *Res adjudicata by an order.*] An order not appealed from and unreversed is conclusive against the right of the moving party to the same relief on a second motion. OPPENHEIM v. LEWIS..... 332

6. — *Replevin — a dismissal of the complaint as to the defendants other than the sheriff — it does not authorize a direction to the plaintiff to return to the sheriff the chattels replevied.*] *Semble*, that where the complaint, in an action of replevin, is dismissed as to defendants, other than the sheriff, and no right is reserved to them to make any further application in the matter, they are not entitled to an order directing the return to the sheriff by the plaintiff of the goods which he had replevied. *Id.*

7. — *Default — not opened where the party has deceived the court.*] A default will not be opened where it appears that the plaintiff who moves to open it and vacate a judgment entered thereon has imposed upon his own attorney and practiced a gross deceit upon the court by exaggerating his bad condition of health and pretending to be unable to travel when he could have done so and was at the time transacting business at his own office.

RANDELL v. NAT. RIVET & NOVELTY CO..... 388

8. — *Irregular judgment — the remedy is by motion and not by appeal.*] If a judgment in an action is irregular, because it should not have been entered in favor of defendants who were not served or who had not appeared in the action, the remedy is not by appeal, but by a motion to set the judgment aside. SEAGRIST v. SIGRIST..... 336

— *A judgment for the plaintiff in an action of conversion — when it is reversed with costs, upon an appeal, the defendant is entitled to an execution against the person of the plaintiff.*

See KNAPP v. MURPHY..... 88

— *Contempt of court — where a railroad fails to obey a judgment requiring it either to remove an obstruction or to condemn land — appeal.*

See RAY v. NEW YORK BAY EXTENSION R. R. CO..... 539

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— *A judgment roll is evidence for what parties an attorney appeared as bearing on his claim for compensation from others.*

See **PEOPLE v. DORTHY** 308

— *General Rule No. 27 — it does not permit an order, fixing the value of attorneys' services to a party to an action, to be docketed as a judgment.*

See **MYER v. ABBETT** 390

— *When a judgment by default must be directed by the court.*

See **BULGER v. COYNE** 224

— *Reservation in a decree of divorce of the right to apply for alimony.*

See **NOBLE v. NOBLE** 395

LACHES — *Teacher — mandamus to compel reinstatement, denied because of laches involved in his seeking another remedy.*

See **PEOPLE EX REL. STEINSON v. BD. OF EDUCATION** 452

— *Delay in the furnishing of the consideration of a transfer.*

See **COMMERCIAL BANK v. BOLTON** 70

— *What laches does not impute fraud.*

See **NILES v. MATHUSA** 483

LAKE:

See **RIPARIAN RIGHTS**.

LAND:

See **REAL PROPERTY**.

LANDLORD AND TENANT — *Jurisdiction — failure to insert the date in a verification — presumption that a petition in a summary proceeding was verified before the precept was issued.] Where the petition and precept, in a*

landlord and tenant proceeding, are each dated the same day, and the day of the month is not filled in in the jurat attached to the petition, which is, however, verified before the justice of the peace who issues the precept, and his return upon appeal recites "a petition, duly verified, having been presented to the undersigned justice of the peace, on behalf of and by" the landlord, the appellate court will assume that the date of the verification of the petition was the day upon which it was used and upon which the precept was issued thereon, and the justice will not be required to make a further return specifying whether or not the petition was verified prior to the issuing of the precept. **GRIFFIN v. BARTON** 512

— *Lease of agricultural lands for a life — not invalid until after the expiration of twelve years.*

See **PARISH v. ROGERS** 279

LARCENY — *An indictment charging the offense in the terms of the statute, is sufficient.*

See **PEOPLE v. DORTHY** 308

LEGACY — *Legacies cannot be paid from the proceeds of realty unless charged upon it.*

See **JOUFFRET v. LOPPIN** 455

LEGISLATURE — *Powers of.*

See **CONSTITUTIONAL LAW**.

LEVY — *Under an execution.*

See **EXECUTION**.

LIBEL — *When vindictive damages are proper.] Vindictive damages may be given in an action for libel, where the jury considers that the defendant was incited by actual malice or acted wantonly or carelessly in making the defamatory charge.* **KARWOWSKI v. PITASS** 118

— *Order of arrest in a civil action for libel — what is a final decision within the meaning of the undertaking that the plaintiff was "not entitled to the order of arrest" — vacation of the order on the merits.*

See **ALLAIRE v. KALFON** 546

LIBELING VESSELS:

See SHIPPING.

LICENSE — To sell liquor.

See INTOXICATING LIQUOR.

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LIEN — Mechanic's lien — verification by an agent of a company.] 1. A mechanic's lien signed "Union Stove Works, by Newton H. Burr, agent," verified by the affidavit of the agent, in the precise words of the statute (Laws 1885, chap. 342, § 4), is sufficient as to its verification, although it does not appear therefrom whether the verification was based upon the knowledge of the agent, or upon information and belief.

UNION STOVE WORKS *v.* KLINGMAN 449

2. — *When furnaces and ranges are fixtures — a lien may be supported for labor and materials used in setting such furnaces and ranges.]* Where a contractor, during the construction of flats, for the purpose of sale, furnishes to the owner thereof, furnaces set in the cellars, from which pipes run to the chimneys and through the partitions to registers on different floors, and also ranges having the usual attachments and connected with the water pipes, the circumstances indicate that the furnaces and ranges are intended to be annexed to the realty and to pass as fixtures, and the contractor is entitled, under the statute, to file a lien against the property, not only for their value, but also for the labor of setting them and for the necessary pipes and appliances furnished therewith, although a portion of the material, notably the ranges, may be removed from the buildings without difficulty. *Id.*

3. — *Mechanic's lien — payments made in good faith in advance of their becoming due.]* Under the provisions of the Mechanics' Lien Act (Chap. 342, Laws of 1885, as amended by chap. 673, Laws of 1895) an owner of property, engaged in erecting a building thereon, who, in good faith and without fraud or collusion, pays to the principal contractor a balance due him, in advance of the time of payment fixed by the contract, is entitled to be credited with the amount of such payment in an action brought by creditors of the contractor to enforce liens filed against the property for materials furnished by them to the contractor, and used in its construction.

MILLER *v.* SMITH. 507

4. — *Effect of the contractor giving a note to a sub-contractor.]* The fact that a sub-contractor receives from the principal contractor a note for his claim against him, does not extinguish the debt, nor prevent the former, upon the dishonor of the note, prior to the expiration of the time for filing a mechanic's lien upon the premises, from availing himself of that remedy. *Id.*

— *An order to pay a third person from a fund — it must have a valuable consideration to make it an equitable assignment — lien for work done.*

See SHAW *v.* TONNS. 89

LIFE ESTATE — Lease of agricultural lands for a life — not invalid until after the expiration of twelve years.

See PARISH *v.* ROGERS. 279

See REAL PROPERTY.

LIFE INSURANCE:

See INSURANCE.

LIMITATION OF ACTION — The Statute of Limitations is a defense at law — it will not be considered in an action to construe a will — surrogate to determine as to the payment of legacies.] The proper place for an administrator to obtain a decree for the payment of legacies, when the question is presented as to whether they are barred by the Statute of Limitations, is in the Surrogate's Court, and unless some special reason exists for its so doing, the Supreme Court will not assume jurisdiction of the matter.

The duty of an administrator to plead the statute as against a legatee discussed.

Semble, that, as the Statute of Limitations is a perfect defense to an action at law, equity will not consider the question in an action brought by an executor to obtain a construction upon the will of his testator.

PRATT *v.* ROMAN CATHOLIC ORPHAN ASYLUM. 352

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— *Statutory reference of a claim rejected by an administrator — how the defense of the Statute of Limitations must be presented.*

See *FABURN v. DIMON*..... 529

LIQUOR SELLING — *Regulation of.*

See *INTOXICATING LIQUOR.*

LLOYDS SYSTEM — *Of fire insurance.*

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LOAN — *Action for the breach of a promise to loan money repayable on demand, when maintainable — measure of damages.*

See *CONTRACT.*

— *Construction of an agreement for the negotiation of a loan — when a refusal to accept the loan is not justified.*

See *CONTRACT.*

MALICE — *In an action for slander.*

See *SLANDER.*

MANDAMUS — *Demurrer to an alternative writ of mandamus.*] 1. An alternative writ of mandamus has the character of a complaint in an action; it must state the facts which constitute the cause of the grievance of the relator, and is subject to a demurrer when no sufficient cause appears.

PEOPLE EX REL. MCGUIRE v. BRICKLAYERS' UNION.....

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2. — *The sufficiency of the writ is put in issue by a demurrer to the return.*] A demurrer to a return to a writ puts in issue the sufficiency of the writ itself. *Id.*

3. — *Application for restoration to full membership in a trades union, which does not state that the relator has been expelled.*] Where the proof in support of such a writ, procured by a member of a trades union, alleges, in substance, that the union has refused to accept his dues because he has failed to pay a fine imposed upon him, and for the same reason has declared a "strike" against him by which he lost work; that a committee of the international union, of which he is a member, has, as he has been informed, decided adversely to him, upon his application for his restoration to his rights in the local union, and there is no statement of the effect which this latter determination may have, nor any allegation that he has been expelled from or has ceased to be a member of the local union, there are no facts stated sufficient to justify the issue of an alternative writ of mandamus requiring the local union to reinstate the relator to complete membership, or to show cause to the contrary. *Id.*

4. — *Denial, in a return, of knowledge or information.*] A return made to an alternative writ of mandamus, which denies any knowledge or information sufficient to form a belief as to the matters set forth in the writ, puts such matters in issue. *Id.*

5. — *An Appellate Division may, upon an appeal from an order denying an application for a peremptory writ of mandamus, grant the writ.*] The provisions of section 2068 of the Code of Civil Procedure, enacting that a writ of mandamus cannot be granted except at a Special Term of the court, apply only to an original application for the writ, and have no effect upon section 1817 of the same Code, providing that an Appellate Division may reverse, affirm or modify any order appealed to it.

PEOPLE EX REL. KAVANAGH v. GRADY..... 27

6. — *To disregard a writ so granted is a contempt of court.*] A failure to comply with the terms of a peremptory writ of mandamus, issued upon an order, made on appeal, by the Appellate Division, constitutes a contempt of court. *Id.*

7. — *Where an alternative writ of mandamus need not issue.*] There is no occasion to issue an alternative writ of mandamus, where, after the proof is all in, it appears that there is no material dispute of fact, and that the right of the applicant, if he has any, depends merely upon the decision of questions of law. *PEOPLE EX REL. BANTEL v. MORGAN*.....

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MANDAMUS—*Continued.*

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- *Teacher—mandamus to compel reinstatement, denied because of laches involved in his seeking another remedy.*
See PEOPLE EX REL. STEINSON v. Bd. of Education. 452
- *The right to a writ of mandamus is not an absolute one.*
See PEOPLE EX REL. CANAVAN v. COLLIS. 341

MANUFACTURING CORPORATION :

See CORPORATION.

MAP—*Reference in a statute to a map—attaching additional sheets to a map after it has been filed.*

See STATUTE.

MASTER AND SERVANT—*Sale upon the installment plan—the vendor is not liable for an assault committed by its collector in attempting forcibly to remove a sewing machine for non-payment by the purchaser.] A vendor of goods sold upon the installment plan, who employs a man to collect installments and expressly instructs him that he must not in any case touch or take the goods for the non-payment of an installment, is not liable for an assault upon the vendee committed by the collector, while attempting to retake the goods because of the non-payment of an installment, as such act is not within the scope of the collector's employment.*

Semble, that even in the absence of such instructions no liability would exist in such a case on the part of the vendor.

FENERAN v. SINGER MFG. CO. 574

— *Negligence—injury from driving into a pile of planking left unlighted at the approach to a canal bridge—liability of a railroad company for the act of an independent contractor laying its rails on the bridge.*

See WEBER v. BUFFALO RAILWAY CO. 292

— *Negligence—a teamster, while rendering, by direction of his master, services to a third person, injured by the negligence of the latter's servant—no action lies against the third person—fellow-servants.*

See CUNNINGHAM v. SYRACUSE IMPROVEMENT CO. 171

— *Negligence—an employee falling down an unlighted elevator shaft—the master cannot delegate the duty of lighting the gas—a failure to provide statutory automatic doors.*

See SIMMONS v. PETERS. 251

— *Negligence—failure of master to have a machine oiled, resulting in its becoming unmanageable and cutting off an employee's fingers.*

See PRESCOTT v. OTTMAN LITHOGRAPHING CO. 397

— *Negligence—the lamplighter of a contractor for a railroad structure chasing a boy who ran on the tracks and was killed.*

See KAISER v. MCLEAN. 326

MEASURE OF DAMAGES :

See DAMAGES.

MECHANIC'S LIEN :

See LIEN.

MILL—*Law relating to.*

See RIPARIAN RIGHTS.

MISTAKE—*Money had and received—action by a grantor against a mortgagee who has required the purchaser to pay a sum (deducted from the purchase price) in excess of the amount due.*

See LAWATSCH v. COONEY. 470

MITIGATION—*Plea in mitigation of slander.*

See SLANDER.

MONEY RECEIVED—*Contract by the directors to turn over the control of a corporation to a party paying therefor.] 1. A contract by which the directors of a solvent assessment co-operative life insurance company agree with a*

MONEY RECEIVED — *Continued.*

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third party that, in consideration of the payment by him to them of a bribe of \$15,000, they will turn over to him the entire control of the company, from time to time resign their offices and permit his nominees to be substituted, is wholly void. *McCLURE v. LAW*..... 459

2. — *An action does not lie against them for money received.*] Such acts are not done in pursuance of any duty which the directors owe the company, nor are they related to its business or capable of ratification by it, and a receiver of the company subsequently appointed cannot maintain an action as for money had and received to the use of the company, to recover a part of such moneys from one of the culpable directors, as the director cannot in any sense be deemed to have received his share of the bribe for, or as the agent of, the company. *Id.*

3. — *Money paid for a sale of the control of a corporation — it cannot be followed into the hands of the holder of an invalid obligation of the corporation.*] Where the directors of an assessment co-operative life insurance corporation agree to and do procure the control of the corporation to be transferred to a party who pays \$15,000 therefor, under whose management the corporation becomes insolvent and a receiver of its property is appointed, the fact that out of such money the directors pay to the holder of an unenforceable obligation of the corporation, who receives it in good faith, the amount thereof, does not render the latter liable to the receiver for the amount so paid. *McCLURE v. TRASK*..... 466

4. — *Action by a grantor against a mortgagee who has required the purchaser to pay a sum (deducted from the purchase price) in excess of the amount due.*] Where, on a transfer of real property, the grantor is to receive a fixed sum, less the amount of the liens and incumbrances thereon, he may recover, in an action for money had and received, from the holder of a mortgage on the premises, the excess, beyond the legal amount due such mortgagee, which he has exacted from the grantee as a condition of satisfying the mortgage, whether the improper exaction resulted from mistake, coercion, misrepresentation or fraud. *LAWATSCH v. COONEY*..... 470

MORTGAGE — *Foreclosure — surplus moneys, distributed to the widow and heir without notice to a general creditor of the mortgagor — action to compel a return of the money.*] 1. Surplus moneys, arising from the foreclosure of a mortgage given by a decedent, are, by the provisions of section 2798 of the Code of Civil Procedure, real property applicable to the payment of his debts in case of a deficiency in his personal estate, and where his administratrix, who is also his widow, without notice to a general creditor of the decedent, procures an order from the Supreme Court directing such a surplus, in the hands of a county treasurer, to be distributed to herself as widow and as guardian of the infant heir of the decedent, such general creditor, herself the purchaser at the sale in foreclosure, but not a party to that action, may, upon allegations that the personalty of the decedent is insufficient to pay his debts, maintain an action to compel the administratrix to return to the county treasurer the moneys wrongfully diverted by her, to the end that the plaintiff's debt be paid.

Seem, that within three years from the time that the letters of administration were issued, the creditor may, under section 2750 of the Code of Civil Procedure, proceed, by petition in the Surrogate's Court, to enforce her lien upon the surplus moneys, returned to the hands of the county treasurer, in which proceeding the dower of the widow in the surplus may be admeasured. *FELTS v. MARTIN*..... 60

2. — *Complaint in foreclosure — allegations showing that executors have legal capacity to sue.*] Where the complaint in an action brought by executors to foreclose a mortgage belonging to the estate of their testatrix, after stating the execution and delivery of the bond and mortgage to their testatrix, a default in payment, the date and place of her death, the admission of her will to probate by, and its record in the office of, the proper surrogate, further alleges "That in and by said last will and testament the said Ellen McMahon (the testatrix) duly appointed these plaintiffs to be the sole executors and trustees thereof, and on the said 15th day of February, 1896, letters testamentary were duly issued to these plaintiffs, who had duly qualified

MORTGAGE—Continued.

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as such on the same day." it sufficiently appears from the complaint that the plaintiffs have legal capacity to sue, although there is no specific allegation that the plaintiffs were appointed, or that letters were issued to them, by any surrogate. *BRENNER v. McMAHON*. 8

3. — *Chattel mortgage — when not shown to be fraudulent as to creditors.*] The mere fact that a mortgagee of potatoes testifies, upon the trial of an action involving the validity of his mortgage, that the mortgagor said "that if he didn't get the money of me he would have to sell his potatoes, and I took the mortgage so that he might keep his potatoes," does not necessarily show that the mortgage was fraudulent; and where, in such a case, it appears that the mortgagee, in money and by the surrender of a note of the mortgagor, paid full value for the mortgage, and that the mortgagor applied substantially all the cash proceeds towards the payment of his creditors, the jury is justified in finding that the mortgage was not given with an intent to hinder, delay or defraud creditors. *POCHEL v. READ*. 208

4. — *Mortgage foreclosure — defense of false representations — to whom not available.*] *Semble*, that one who has purchased real estate subject to the lien of an existing mortgage cannot successfully allege, as a defense to an action brought to foreclose it, that the party from whom his immediate grantor purchased made fraudulent representations as to the value of the premises to such grantor, upon which he relied, and that the holder of the mortgage in process of foreclosure participated in these fraudulent representations. *COMMERCIAL BANK v. CATTO*. 286

5. — *Foreclosure — redemption by a junior incumbrancer, not made a party.*] Where the holder of a duly recorded junior mortgage is not made a party to an action brought to foreclose a prior mortgage existing upon the same premises, the purchaser at such foreclosure sale occupies as to such junior mortgagee the position of a mortgagee in possession from whom the junior mortgagee is entitled to redeem. *NAYLOR v. COLVILLE*. 581

6. — *Redemption allowed without a resale.*] In such a case the decree of redemption should permit such purchaser to retain the possession on paying to the junior mortgagee the amount due to him and he should not be compelled to submit to a sale. *Id.*

7. — *Costs against purchasers who resist a redemption.*] The rule that a subsequent incumbrancer, seeking to redeem, must pay the costs of the suit, does not apply where the defendants improperly resist the assertion of the right of redemption. *Id.*

— *Mortgage foreclosure — who are necessary parties to it — conveyance by the mortgagor to a receiver of his property — his right is only to compel the receiver to account — voluntary appearance of a receiver as "John P. Jenkins, Receiver."*

See *GRAHAM v. LAWYERS' TITLE INSURANCE CO.* 440

— *Construction of a chattel mortgage of a license and its "renewal" — what will be construed to be an action to foreclose it — costs against a defendant claiming to have an interest.*

See *McNEELEY v. WELZ*. 566

— *Money had and received — action by a grantor against a mortgagee who has required the purchaser to pay a sum (deducted from the purchase price) in excess of the amount due.*

See *LAWATSCHE v. COONEY*. 470

— *Measure of liability of attorneys representing a mortgage to be a first lien, which proves not to be so.*

See *FAY v. MCGUIRE*. 569

MOTION AND ORDER— *Motion papers to open a default in pleading — they should contain a copy of the proposed answer.*] 1. Motion papers used to open a default in answering must contain a copy of the proposed answer.

RICHARDSON v. SUN PUBLISHING CO. 829

2. — *Costs not granted to abide the event.*] Where such a motion is granted, costs should not be granted to abide the event. *Id.*

MOTION AND ORDER—*Continued.*

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— *General Rule No. 27*—it does not permit an order fixing the value of attorneys' services to a party to an action, to be docketed as a judgment.

See MYER v. ABBETT 390

— *Application to be made a party to an action*—when it may be granted only on terms.

See WALL v. BEACH 480

— *Irregular judgment*—the remedy is by motion and not by appeal.

See SEAGRIST v. SIGRIST 336

— *Res adjudicata by an order.*

See OPPENHEIM v. LEWIS 332

MUNICIPAL CORPORATION—*Street railroads*—a consent of a common council that a street railroad may maintain a certain rate of speed, is subject to change.] 1. A stipulation, contained in the consent of the common council of a city to the construction of a street railroad operated by electricity, that the rate of speed should in no instance exceed ten miles per hour is not available to the railroad company as a contract giving it the right thereafter to operate its cars at that speed.

The provisions of the Railroad Act (Laws of 1890, chap. 565, § 98), that the proper local authorities "may make such reasonable regulations and ordinances as to the rate of speed (or) mode of use of tracks * * * as the interests or convenience of the public may require," grant to a common council a continuous power to control the speed of street cars, and one common council cannot bargain away the rights of its successors to exercise such power. CITY OF BROOKLYN v. NASSAU R. R. Co. 31

2. — *Police power over the rate of speed.*] *Semble*, that the rate of speed of cars in streets and highways cannot be made the subject of contract either by the Legislature or by the common council of a city, as the matter is within the police power of the State, and the Legislature cannot divest itself of such power. *Id.*

8. — *Brooklyn*—liability of, for an award made in a street opening proceeding—effect on the obligation of the city of a charter provision that awards are to be paid pro rata from assessments as collected.] The amendment, made to the charter of Brooklyn by section 27 of title 18 of chapter 863 of the Laws of 1873, directing the city comptroller to "pay to a person to whom damage may have been awarded" in a report of commissioners appointed to open a street, "the amount of such damages, with interest at the rate of seven per cent per annum, from a day thirty days subsequent to the day of confirmation of the respective assessments, pro rata, as moneys on account of such assessments shall be received from the department of collection," was not intended to alter the ultimate liability of the city under the charter of 1854, to pay such awards, but is properly construed as requiring that, during the period prescribed for the collection of an assessment and before the assessment roll is turned over by the collector to the registrar of arrears, money received from the assessment is to be paid, pro rata, on the awards made to landowners, and that, at the termination of that period, the city shall be forthwith liable to pay any awards then unpaid, whether in whole or in part.

MATTER OF BAY TWENTY-THIRD STREET. 28

4. — "Electors," as used in chapter 525 of 1888, authorizing the acquisition of lands for village park purposes.] Chapter 525 of the Laws of 1888, permitting the trustees of an incorporated village to acquire land for a park, and to cause the sum necessary to procure the title thereto to be raised by taxation, either in a single sum or by installments, when "authorized so to do by a vote of the majority of the electors of the village," is not affected by the provisions of section 13 of title 2 of the General Village Act (Chap. 291 of the Laws of 1870), providing that no person shall vote at a village election upon a proposition to raise or appropriate a tax or purchase property unless, at the time, he or his wife be the owner of property assessed on the last preceding assessment roll.

The statute of 1888 is an original enactment, and the word "electors," as used therein, embraces all those citizens of the State who, under the Constitution and statutes, are entitled to vote at elections for public officers.

SCOTT v. TWOMBLY 535

MUNICIPAL CORPORATION — Continued.

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5. — *Power of the village to issue negotiable bonds to pay for such lands — a holder of a bond is an equitable assignee of the debt.*] *Semble*, that although a village has power, under the act of 1888, to purchase land for park purposes on credit, it has not power to issue negotiable bonds to pay therefor, as the issue of such bonds may, on account of their negotiability, impose greater liabilities upon the village than a simple non negotiable debt to the vendors of the park lands; but although bonds thus issued may be void, they still represent specific parts of the village debt, and a purchaser thereof is the equitable assignee of such part of that debt. *Id.*

6. — *Village fire department — recommendation of chief engineer and assistants — appointed by village trustees.*] The provisions of section 8 of chapter 244 of the Laws of 1887, providing that the convention of delegates of the fire companies "shall select separately by ballot suitable persons, electors of such village, for chief engineer and first and second assistant engineers, and the individuals receiving the greatest number of votes for those several offices shall be recommended to the board of trustees of said village for their appointment," and of section 4 of said act, providing that "The board of trustees of such village, upon such recommendation, shall appoint a chief engineer and two assistant engineers who shall be electors of said village and who shall hold their offices during the pleasure of said board," seem to contemplate that, before the duty of appointing a chief engineer and assistants is imposed upon the board of trustees, the convention of the delegates of the fire companies must recommend suitable persons for such offices, and that such persons so recommended must be appointed by the trustees. *PEOPLE EX REL. GRIM v. HAYES*.....

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7. — *Power of the trustees in case of a tie vote of the delegates of the fire companies.*] Where there is a tie vote in such convention of delegates, even though the statute be so construed as to allow the trustees to disregard such recommendation in their appointments, the trustees will not be compelled by mandamus to make such appointments where there are present incumbents of such offices, in view of the fact that the statute provides that they "shall hold their offices during the pleasure of said board." *Id.*

8. — *New York police commissioners — charge that a policeman procured his appointment by fraud — written charges and a hearing, not required.*] An investigation by the police board of the city of New York of a charge that a member of the force, prior to his appointment and while passing a civil service examination, did not, as required by its rules, himself subscribe the certificate of a surgeon relative to his eligibility, but procured it to be subscribed in his name by another person, does not relate to any offense committed by the accused as a member of the force, but is directed to the question whether he was ever legally appointed as such; and hence no written charges or specifications need be served upon him, nor need the hearing of the charge be conducted in the manner required by law where the member upon trial is a lawful appointee.

PEOPLE EX REL. COHEN v. MARTIN.....

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9. — *Village bonds — when expenditures are "extraordinary."*] On June 12, 1897, village bonds, when authorized by a vote of the electors of a village, for "extraordinary expenditures" of the village, mentioned in section 4 of title 4 of chapter 291 of the Laws of 1870, as amended by chapter 131 of the Laws of 1884 and by chapter 879 of the Laws of 1895, might be issued, for any village purpose, where the amount of the expenditure was in excess of the limit of amount (\$500) imposed, by section 3 of title 4 of chapter 291 of the Laws of 1870, as amended by chapter 400 of the Laws of 1893, upon the village trustees in making "ordinary expenditures."

ARVERNE-BY-THE-SEA v. SHEPARD.....

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— *Eminent domain — reference in a statute to a map — attaching additional sheets to a map after it has been filed.*

See MATTER OF THE MAYOR.....

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MUNICIPAL COURT OF BUFFALO — *It has no jurisdiction of an action between two domestic corporations non-residents of Erie county.*] The Municipal Court of the city of Buffalo has no jurisdiction over an action between two domestic corporations, neither of which is shown to be a resident of, or

MUNICIPAL COURT OF BUFFALO — *Continued.*

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to have its principal office or place of business in, or to have been in the county of Erie at the time when the action was begun, the officer served not being a resident of that county.

REVERE RUBBER Co. v. GENESEE BLUE S. Co. 166

MUNICIPAL COURT OF ROCHESTER — *Costs—on appeal from the Municipal Court of Rochester.*] In an action brought in the Municipal Court of Rochester to recover thirty-seven dollars and fifty cents for merchandise sold, in which the defendant answered, interposing a counterclaim and demanding judgment in his favor for five hundred dollars, judgment was rendered in favor of plaintiffs for thirty-five dollars and twenty-five cents damages and ten dollars and sixty-five cents costs, from which the defendant appealed to the County Court of Monroe County demanding a new trial, on which a verdict was rendered in favor of the defendant for "no cause of action."

Held, that although the defendant did not sustain his counterclaim, the verdict was in his favor to the extent of destroying the judgment and claim of the plaintiffs, which stood against him when the appeal was taken, and that, no offer of judgment having been made by either party, he was entitled to costs upon such appeal. CLARK v. MALZACHER. 301

NEGLIGENCE — *Injury from driving into a pile of planking left unlighted at the approach to a canal bridge—liability of a railroad company for the act of an independent contractor laying its rails on the bridge.*] 1. In an action brought to recover damages for injuries sustained by the plaintiff, a member of the fire department of the city of Buffalo, while being driven to a fire, by reason of his coming in contact with a pile of planking left unlighted and unguarded in the approach to a public bridge over the Erie canal in that city, it appeared that the work in question was being done by an independent contractor with the Buffalo Railway Company, the defendant in the action, which operated a street surface railway in said city across the Erie canal upon the bridge, the property of the State of New York, which was under the supervision and control of the Superintendent of Public Works; by this superintendent the defendant had been granted a permit authorizing the reconstruction and strengthening of the bridge, upon the condition that the company "shall be held liable for and shall pay the damages that may occur or arise, either to the State or to individuals, in consequence of the reconstruction and strengthening of said canal bridge," and that the acceptance of the permit by the company "shall be deemed a covenant for the faithful performance of all the conditions and requirements herein contained," it being made the duty of the Superintendent of Public Works "to cause to be inserted in all contracts for work or repairs on the canals a clause requiring the contractor to pay all damages arising to the State or to any individual by reason of the negligence, default or misconduct of such contractor in the performance of such contract," and jurisdiction being (by chap. 321, Laws of 1870) "granted to and conferred upon the Canal Appraisers to hear and determine all claims against the State of any and all persons and corporations * * * resulting or arising from any accident or other matter or thing connected with the canals."

The independent contractor with the defendant agreed, among other things, to protect and save harmless the company from all damages "to persons or property of the public happening through the operations of the contractor."

Held, that, although the relation of master and servant did not exist between the company and the contractor, the true relation being that of principal and contractor, the defendant, having contracted with the State to perform the State's duty in its stead, and to pay all damages that might occur to the State or to individuals in consequence of the defendant's non-performance thereof, in view of the statutory obligation, was not absolved from its duty and responsibility in the premises to safeguard the public highway or approach to the bridge, by reason of its having employed an independent contractor to perform the work under a stipulation that he would perform such duty;

That, as the very nature of the work which the defendant undertook to do involved danger to persons lawfully on the highway, it was the defend-

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ant's duty to see that proper safeguards or warnings were provided, while the work was in progress, to afford reasonable protection to the public.

WEBER v. BUFFALO RAILWAY CO..... 292

2. — *A lineman of a telegraph company killed by touching an iron brace upon his own pole, in contact with the bare wire of an electric lighting company — proof that a "flash" was caused by touching the iron brace with a wire.* A lineman of a telegraph company, not wearing gloves, after ascending one of its poles, which carried wires having an electric current of about 160 volts, and upon grasping an iron brace supporting a crossarm upon his own pole, in regard to which there was evidence from which it might be inferred that it came in contact with the wire of an electric light company carrying a deadly current of about 1,100 volts from which the insulation had been abraded by contact with the brace, neither the fact of contact nor the defect in insulation being determinable from the ground, instantly threw up his arms and fell backwards and was picked up dead. Across the palm of one of his hands there was a mark about an inch wide which looked like rust, and the autopsy indicated that the deceased had received a more or less severe shock of electricity.

In an action brought by the administratrix of the deceased against the electric light company to recover the damages resulting from his death,

Held, that the court was justified in submitting to the jury the questions as to the defendant's negligence and the contributory negligence of the plaintiff's intestate :

That a witness might testify that a flash of light was occasioned by the touching of a wire to the iron brace attached to the telegraph pole—such testimony is the statement of a fact, not the expression of an opinion.

DWYER v. BUFFALO GENERAL ELECTRIC CO..... 124

3. — *A woman, crossing a street in the middle of a block, thrown down by a rope which was being slowly dragged along by horses.* In an action to recover damages for personal injuries, it appeared that the defendants, who were engaged in stringing an electric cable from the girders of an elevated railroad structure situated upon a public avenue, used for the purpose a rope about 500 feet long, one end of which was attached to the cable and the other to a team of horses; that men were stationed along the rope from 150 to 160 feet or more apart, to warn persons of its existence, and to direct the movements of the horses; that the plaintiff, who came upon the avenue from a cross street, walked to the middle of the block, and while attempting to cross the avenue diagonally, after having previously looked both ways for surface cars, which were being operated upon the avenue, and having failed to observe the rope, the horses dragging it, or the warning motion which the watcher on the line of the cross street gave her, was knocked down by the rope, which was about one and one-quarter inches in diameter, of the color of the surrounding dust and dirt, and which was being slowly and noiselessly dragged either between the rails of the surface railroad or in the groove of one of the rails.

Held, that under the evidence the question whether the defendants had taken adequate means to protect persons who might be expected to be upon the street was one of fact for the consideration of the jury;

That the fact that the plaintiff crossed the street in the middle of the block was immaterial, even though it was very likely that, if the plaintiff had crossed the avenue upon the line of the cross street, the situation would have been such as to enable the watcher to give and the plaintiff to receive warning of the danger;

That the question of the plaintiff's contributory negligence was one of fact for the jury. COXHEAD v. JOHNSON..... 605

4. — *Excessive verdict.* A verdict for \$15,000 in favor of a plaintiff, a dressmaker earning \$2 a day, who sustained a fracture of the upper extremity of her left thigh bone, just outside of the hip joint, commonly called a broken hip, held to be excessive and reduced to \$10,000. *Id.*

5. — *Duty of a gripman on a cable car when approaching a crossing.* Negligence may be ascribed to a gripman who runs his cable car at such a speed, in approaching a cross street, that he cannot avoid colliding with a

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vehicle coming along the cross street and plainly visible 100 feet away; or who does not stop his car within that distance and avert the collision, when his car is moving moderately. *Cass v. Third Avenue R. R. Co.*..... 591

6. — *Opinions of physicians as to the permanency of injuries.*] After an attending physician has described to the jury injuries caused by an accident he may, in answer to a question whether "these injuries" were permanent in their nature or not, state that the man was permanently injured. *Id.*

7. — *Statement by the party injured that he has since been unable to work.*] A statement by the injured person that he had not done any work since the accident because he had not been able to do any, is not objectionable as a conclusion of the witness; it is only another form of saying that his physical disability was such as to prevent him from working. *Id.*

8. — *Contributory negligence of a driver imputed to one riding with him.*] Where the driver of a wagon and an injured person are engaged in a common enterprise, contributory negligence on the part of the driver is imputed to the person injured. *Id.*

9. — *Charge that a person was not negligent in attempting to cross in front of a car.*] A charge of the court, in substance, instructing the jury that it was not negligence to attempt to cross in front of a car more than fifty feet distant, provided the car was capable of being stopped within fifteen or twenty-five feet, is improper, as that question is one to be decided by the jury only.

Such error is not cured by the fact that the court subsequently adds: "But, of course, as I have said, the jury deal with the question of the plaintiff's negligence as well as that of the gripman's negligence in the light of all of the surrounding circumstances connected with this case, and as they shall find them from the testimony in the case." *Id.*

10. — *Questions directed to the credibility of a witness.*] *Semble*, that with a view to testing his credibility as a witness, a policeman may be asked on cross-examination whether he ever made arrests for reckless driving, whether it was not his duty so to do, and whether it was not his duty to arrest a gripman if he saw him driving his car recklessly and running into people. *Id.*

11. — *A person killed at a railroad crossing where there were no eye-witnesses — inferences as to negligence and contributory negligence.*] Evidence that shortly after a train, moving south through a city, at a speed of thirty-seven miles an hour, upon a dark and foggy night, had passed a street crossing, a man was found dead, about fifty-six feet south of the crossing, with his skull fractured and his side crushed in, that near him lay a small lantern which belonged to the pilot beam of the locomotive of that train, the door of which lantern was within the lapel of his overcoat, and that when the locomotive arrived in New York city the lantern was missing, and there was blood on the crossbeam of the locomotive, that a northward-bound train had passed the crossing just before the south-bound train, and that on a side track north of the crossing stood freight cars in such a position with reference to the approaching train as to interfere with the view until a person was very close to the track, is proof sufficient, although no one witnessed the accident and there was evidence that the engine bell was rung, to require the submission to the jury of the questions of negligence and contributory negligence. *Noble v. N. Y. Central & H. R. R. Co.*..... 40

12. — *Charge as to the speed of the train.*] In such a case, a charge by the court to the jury, that negligence might be predicated upon the speed of the train under the conditions existing at the time and place of the accident, is proper. *Id.*

13. — *An employee falling down an unlighted elevator shaft — the master cannot delegate the duty of lighting the gas.*] The duty of lighting gas, provided by an employer in order to afford to his employees a reasonably safe means of access to an elevator in a manufacturing establishment, is one which cannot be delegated by the employer, and the failure of an

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employee to light the gas in question will not exonerate the employer from liability to a co-employee injured by reason of its not being lighted. *SIMMONS v. PETERS*. 251

14. — *A failure to provide statutory automatic doors.*] An omission of the employer to comply with section 8 of chapter 462 of the Laws of 1887, requiring the owner of a manufacturing establishment to provide his elevator shafts with a trap or automatic doors, so fastened in the elevator shaft as to form a substantial surface when closed, and so constructed as to open and close by the action of the elevator in its passage, either ascending or descending, where such omission appears in an action brought by an employee to recover for injuries sustained in falling down an elevator shaft not provided with such an automatic attachment, may properly be alluded to in the charge to the jury, accompanied by a statement that it had nothing to do with the employee's right to recover unless it directly contributed to the injury complained of. *Id.*

15. — *Explosion of a heating apparatus in a part of a hotel used as a railroad depot.*] A passenger injured while waiting in a room in a hotel, temporarily occupied by a railroad company as a depot, by the explosion of the hotel heating apparatus of a kind in common use and from which, if properly operated, no danger was to be apprehended, not controlled by the company, and dangerous merely when a certain valve was improperly operated, has no cause of action against the railroad company nor against the hotel-keeper in the absence of proof of the cause of its explosion or of negligence in its operation. *KIRBY v. D. & H. C. Co.* 478

16. — *The doctrine of res ipsa loquitur inapplicable — failure to inspect it.*] The doctrine of *res ipsa loquitur* has no application to such a case. The failure of the company to inspect the heating apparatus is not material where such inspection, if made, would not have disclosed the fact that danger was to be apprehended from the apparatus. *Id.*

17. — *Testimony of a physician as to the permanency of injuries and their probable effect.*] A physician, who examined an injured person and has testified that in his opinion she was suffering from spinal irritation, may give his judgment as to whether the difficulty will prove permanent, and what effect upon the system it will have, and may describe the probable effect, such as "nausea and vomiting, and also disturbed action of the heart, faintness, and affected the pulse, make it weak, perhaps irregular, produce pallor of the skin," etc. Such evidence is not mere conjecture, but expresses the deliberate judgment of a man of science, based upon actual observation or experience, as to results and conditions which might naturally and ordinarily be anticipated. *MAHER v. N. Y. CENTRAL & H. R. R. Co.* . . . 161

18. — *Failure of the master to have a machine oiled, resulting in its becoming unmanageable and cutting off an employee's fingers.*] Proof that if a press was not properly oiled, its clutch, designed to allow the press to make one operation by a pressure of the foot, would "break or throw it out" and "allow the press to keep going right on around without any effect of the treadle at all," coupled with testimony that the press required oiling twice a day, that the master had not appointed any one to see that the machinery was in a safe condition and that an employee lost part of her fingers because the die of the press, which had been oiled only three times in two weeks, instead of stopping when she removed her foot from the treadle, kept plunging and cut off her fingers before she could withdraw them, is sufficient to make the question of the liability of the master to the employee a proper one for the consideration of the jury. *PRESCOTT v. OTTMAN LITHOGRAPHING Co.* 397

19. — *A teamster, while rendering, by direction of his master, services to a third person, injured by the negligence of the latter's servant — no action lies against the third person — fellow-servants.*] A teamster in the general employment of A. was directed by A. to perform such work as might be required of him by B., by whose foreman he was specifically instructed as to the manner in which he was to load stone upon his wagon from a boat. While employed in so doing he was struck by a stone and injured through the negligence of a servant of B. engaged in the work of loading the stone upon the wagon.

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In an action brought by the teamster against B. to recover for the injury thus received, it was held that B. was the master of the teamster and also of the servant through whose negligence he was injured, they being co-servants in the same common employment, and that, therefore, the action could not be maintained. *CUNNINGHAM v. SYRACUSE IMPROVEMENT CO.*..... 171

20. — *A brakeman falling at night into a sluiceway in a railroad yard while coupling cars — the question whether the railroad furnished a safe place is for the jury.* Proof that a brakeman, who had been employed by a railroad corporation for only fifteen days, after reaching a railroad "yard" containing seven tracks, through which he had already passed several times, while attempting at night to couple some additional cars to a car of his own train, either slipped, or stepped into an uncovered sluiceway about eight inches deep and fourteen inches wide, of whose existence he was ignorant, lost his balance and injured his hand, which, as he fell forward, caught between the deadwoods of the cars, presents a question for the jury whether the railroad corporation was negligent in failing to furnish its employee a reasonably safe place for the discharge of his duties.

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21. — *Contributory negligence is not a defense where it is a remote and subsequent, and not the proximate and concurrent cause of an accident.* Contributory negligence, to be made available as a defense to an action brought to recover damages for personal injuries, must have been the proximate and concurrent cause of the accident.

A street railway corporation is not relieved from liability for the negligent failure of one of its servants to stop a car in time to avoid striking a man, who has been thrown from a wagon drawn by a runaway horse, and is lying unconscious upon the track, by the fact that the runaway was the result of a collision which occurred, because of the injured man's negligence, between the wagon and another of the defendant's cars which passed upon the same track a few moments previously. *McKEON v. STEINWAY R. Co.*... 601

22. — *The lamplighter of a contractor for a railroad structure chasing a boy who ran on the trucks and was killed.* Proof that a person employed by a contractor, engaged in building an elevated railroad structure, to light lamps at the work and to keep the boys away, chased a boy, upon the structure, away from it, and that the boy, between whom and such person, and on the east side of the railroad tracks, were a number of long timbers, the boy being upon the west and the employee upon the east side thereof, ran to the west through an opening in a wall guarding the railroad tracks and was there killed by a train, when he, being familiar with the situation, might with safety have run in another direction as did his companions, does not create a liability upon the part of the contractor for the death of the boy.

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23. — *A passenger injured at a station by a sudden jerk of the train — when a verdict is against the weight of evidence.* When in an action brought to recover damages for an injury sustained by the plaintiff, while getting off a train, at a station reached before the one called for by his ticket, by reason of the train starting with a jerk, the plaintiff alone testifies to the sudden starting of the train and is contradicted by a number of witnesses, some of whom testify that the plaintiff attempted to leave the train before it stopped, a verdict in favor of the plaintiff was set aside.

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— *Agreement to indemnify a bank for thefts of its secretary — when "indebtedness" covers his own thefts and those of his subordinates occurring by his connivance or negligence — parol evidence as to the meaning of the agreement — interest.*

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NEW YORK CITY — *Eminent domain* — lands taken by statute for a city park — making subsequent changes therein, pending condemnation proceedings — *mandamus*.

See *PEOPLE EX REL. CANAVAN v. COLLIS*..... 341

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— *Trusts* — remaindermen are entitled to notice of an application for the appointment of a new trustee of an express trust which has vested in the court — notice, how given.

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— *Trusts* — appointment of a new trustee of an express trust — notice to remaindermen — rights of remaindermen not within the State.

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OFFICER — A county clerk cannot be allowed by the board of supervisors for money paid to his assistants in assorting jury slips — proof required under the County Law that the money was necessarily expended.

See *MATTER OF WALSH v. SUPERVISORS*..... 489

— *Village fire department* — recommendation of chief engineer and assistants — appointed by village trustees — power of the trustees in case of a tie vote of the delegates of the fire companies.

See *PEOPLE EX REL. GRIM v. HAYES*..... 36

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See *LATIMER v. VEADER*..... 418

— *Polls at town meetings* need not be kept open continuously from sunrise to sunset — a town election board acts ministerially — its acts are not reviewable by certiorari.

See *PEOPLE EX REL. VAN SICKLE v. AUSTIN*..... 1

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PARTITION — *Legacies cannot be paid from the proceeds of realty unless charged upon it* — creditors of a decedent cannot be paid the money realized in an action to partition his real estate until the debts are proved in the Surrogate's Court.

See *JOUFFRET v. LOPPIN*..... 455

PARTNERSHIP — *What facts establish a partnership inter sese.*] 1. A parol agreement, under which one person conducts a malt house while another furnishes the capital, sells the malt and collects its proceeds, accompanied by frequent mutual consultations and statements in regard to the business, which is found to have been conducted for the "mutual benefit of the parties," constitutes the persons partners *inter sese*, and each is entitled, in the absence of any special agreement in that regard, to have and bear respectively an equal proportion of the profits and losses.

The fact that the business was all conducted in the name of one of the parties, and that there was no express agreement between the parties that they were to be partners, does not preclude the existence of a copartnership.

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2. — *A managing partner not entitled to a salary.*] A managing partner, in whose name the business is conducted, is not entitled to a salary where no agreement of the partners to that effect is shown. *Id.*

PARTY — *Application to be made a party to an action—when it may be granted only on terms.*] The provisions of section 452 of the Code of Civil Procedure, to the effect that a person who has an interest in the subject of an action, or in real property the title to which may in any manner be affected by the judgment therein, must, upon application to the court, be made a party to the action, do not prevent the court from imposing terms and conditions on granting the application of an assignee of a mortgage, the assignment of which was made in October, 1896, but not recorded until April, 1897, to be made a party to an action in which the *lis pendens* was filed in November, 1896, it appearing that the assignee had heard about the action in February, 1897, but "did not learn the full facts" until April, 1897, after which latter date and after the action was at issue and noticed for trial, the application was made. WALL v. BEACH..... 480

— *An action for the specific performance of an insurance contract—failure of the company to create and divide a reserve fund—a policyholder cannot sue for specific performance—the action lies against the officers and not the corporation only—constitutional law.*

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— *Mortgage foreclosure—who are necessary parties to it—a conveyance by the mortgagor to a receiver of his property—his right is only to compel the receiver to account—voluntary appearance of a receiver as "John P. Jenkins, Receiver."*

See GRAHAM v. LAWYERS' TITLE INSURANCE CO..... 440

— *Fire insurance, Lloyds system—an action must be brought against the attorney of the underwriters alone—actions cannot be brought, in the first instance, against all the underwriters.*

See LAWRENCE v. SCHAEFER. 80

— *The Municipal Court of Buffalo—it has no jurisdiction of an action between two domestic corporations non-residents of Erie county.*

See REVERE RUBBER CO. v. GENESEE BLUE S. CO. 166

— *A defect of parties, not apparent on the face of the complaint, must be pleaded.*

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— *Mechanic's lien—payments made in good faith in advance of their becoming due—effect of a contractor giving a note to a sub-contractor.*

See MILLER v. SMITH..... 507

PENAL CODE — § 271 — *The inadvertent service of a summons upon a Jew on Saturday is not a misdemeanor and the process is valid.*

See MARTIN v. GOLDSTEIN..... 208

— § 384b — *Interstate Commerce — an ordinary scrub brush, made by convict labor in Ohio and not branded to that effect may, notwithstanding chapter 931 of 1896, lawfully be possessed and sold in the State of New York — limits of the police power of a State.*

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— § 528, subd. 2 — *Larceny — an indictment charging the offense in the terms of the statute is sufficient.*

See PEOPLE v. DORTHY..... 308

— § 562 — *Action by a wife to restrain a woman from holding herself out as the lawful wife of the plaintiff's husband — insufficiency of the complaint — the case is not within the Penal Code, § 562.*

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PENSION — *Pension money — invested in real estate — transfer thereof in fraud of creditors.*] Where a United States pensioner of the civil war conveys premises purchased with his pension moneys to his wife upon her oral agreement to reconvey them to him at his request, a person, ignorant of the wife's promise, who has accepted a note guaranteed by the husband and wife, upon the faith of her apparent ownership of the real estate, is entitled to maintain an action to set aside a reconveyance of the premises, designed to defeat his claim under such guaranty, made by the wife to the husband after the creditor had begun his action upon the note and guaranty.

Quære, whether the husband, by his conveyance to his wife, lost his right of exemption in the property conveyed as against his future creditors.

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PERSONAL PROPERTY — *Conversion — necessity of a demand or a waiver thereof.*] 1. A party lawfully in possession of personal property, who has not attempted to dispose of it or to exercise acts of dominion over it, cannot be held liable for its conversion except upon proof of some act amounting to a conversion, and evidence of a demand is usually a necessary part of such proof. DELAHUNTY v. HAKE... 430

2. — *Proof of a refusal without demand made.*] Where a refusal to make a delivery is accepted as an equivalent for both a demand and a refusal, it must appear that the necessity for a demand was dispensed with. *Id.*

3. — *Proof of a demand as a matter of fact.*] The question whether a demand was made is ordinarily one of fact, and where the proof in an action for conversion is that, at a meeting of the clerks of the attorneys of the parties, held to confer concerning the respective claims of their principals to a certificate of stock, no actual specific demand was made (the whole conversation being open to the construction that it related to a prior and premature demand), it is erroneous for the court to charge the jury, in substance, that the defendants had refused to surrender the certificate and that no demand was necessary where there was a refusal in advance. *Id.*

— *Interstate Commerce — an ordinary scrub brush, made by convict labor in Ohio and not branded to that effect, may, notwithstanding chapter 931 of 1896, lawfully be possessed and sold in the State of New York — limits of the police power of a State.*

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— *A judgment for the plaintiff in an action of conversion — when it is reversed, with costs, upon an appeal, the defendant is entitled to an execution against the person of the plaintiff.*

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— *Executory contract of sale — recovery of the money paid on the delivery of the goods, on the ground that they were not as they were represented to be.*

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— *Foreclosure* — surplus moneys, distributed to the widow and heir without notice to a general creditor of the mortgagor — action to compel a return of the money.

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— *Motion papers to open a default in pleading* — they should contain a copy of the proposed answer — costs not granted to abide the event.

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PRINCIPAL AND AGENT— *Stockbrokers cannot buy in stock for a customer, operating upon a margin, until they have made a reasonable demand for additional margin.]* 1. A broker who has sold stock "short" for a customer, upon a "margin," cannot, where a rise in the stock has made more margin requisite to secure him against loss, without the customer's order or consent, close the transaction by buying in stock for the customer's account, without giving him a reasonable notice to furnish more margin.

The reasonableness of the notice is dependent upon the circumstances of the particular case. **LAZARE v. ALLEN**..... 616

2. — *Life insurance — application signed by another for an insured person who could not write.]* Where the agent of a life insurance company is informed that the insured cannot write, and his sister, by his request, signs his name to the application for insurance, the company cannot subsequently resist payment of the policy upon the ground that the application was not in fact signed by the insured. **PICKETT v. METROPOLITAN LIFE INS. CO.**..... 114

— *Independent collateral oral agreement between an insurance company and its general agent — it may be proved although the contract of agency is in writing — interference with the sub-agents and the business of the general agent, when the agency ends — damages may be recovered although difficult of ascertainment and speculative.*

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PROCESS — *The inadvertent service of a summons upon a Jew on Saturday is not a misdemeanor and the process is valid.]* Section 271 of the Penal Code, providing that "whoever maliciously procures any process in a civil action to be served on Saturday, upon any person who keeps Saturday as holy time, and does not labor on that day, or serves upon him any process returnable on that day, or maliciously procures any civil action to which such person is a party to be adjourned to that day for trial, is guilty of a misdemeanor" — when construed in view of the fact that the 1st and 3d clauses of the section contemplate that the acts therein recited should be done mali-

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ciously, and of the principle that penal statutes should always be construed in favor of civil liberty, and that the section occurs in that part of the Penal Code defining crimes against religious liberty and conscience, and that to constitute a crime there must be not only the act itself, but a criminal intent must accompany it—does not apply to a person who inadvertently procures a summons to be issued out of the Municipal Court of the city of Rochester, whose procedure is similar to that of a court of a justice of the peace, against a Jew, who uniformly observes Saturday of each week as "holy time," and has it made returnable on Saturday, and such summons and its service are valid. *MARTIN v. GOLDSTEIN.*..... 208

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— *Negligence— a person killed at a railroad crossing where there were no eye-witnesses— inferences as to negligence and contributory negligence— charge as to the speed of the train.*

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— *Contempt of court— where a railroad fails to obey a judgment requiring it either to remove an obstruction or to condemn land— appeal.*

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— *Negligence— a passenger injured at a station by a sudden jerk of the train— when a verdict is against the weight of evidence.*

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RANGE— When furnaces and ranges are fixtures— a lien may be supported for labor and materials used in setting such furnaces and ranges.

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REAL PROPERTY— An ante-nuptial contract made in a foreign State— when a bar to a tenancy by the curtesy— the contract inures to the benefit of the wife's devisee or heir— a possessory action by the heir entertained in equity— legal privity unnecessary— demand of possession by letter.

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— *Sale of real estate— action by the vendee to recover liquidated damages— failure to show performance or a tender thereof— exacting what the contract does not provide should be given.*

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— *Trusts— remaindermen are entitled to notice of an application for the appointment of a new trustee of an express trust which has vested in the court— notice, how given.*

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— <i>Auction sale</i> — the employment of puffers avoids the sale.	
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RECEIVER — Mortgage foreclosure — who are necessary parties to it — a conveyance by the mortgagor to a receiver of his property — his right is only to compel the receiver to account — voluntary appearance of a receiver as "John P. Jenkins, Receiver." 1. After the giving of a mortgage, one John P. Jenkins was appointed receiver of the property of the mortgagor, a judgment debtor, who, pursuant to the order of the court, assigned, by a deed of conveyance, all his property to the receiver. Thereafter the receiver was made a party defendant to an action brought for the foreclosure of the mortgage, being described in the title of the action as "John P. Jenkins, Receiver," and subsequently an attorney appeared generally therein for "John P. Jenkins, Receiver." The executor of the mortgagor was made a party, but all his heirs were not made parties to such action.

Held, that the effect of the conveyance was to vest the title to the equity of redemption of the mortgaged property in the receiver, and that there remained in the mortgagor only a right to demand an accounting from the receiver, which right passed to his executor;

That his voluntary appearance was sufficient to bind Jenkins, in his capacity as receiver, by the judgment of foreclosure.

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RECEIVER — Continued.

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2. — *Receiver's accounting — when the validity of his appointment cannot be questioned thereon.*] Where an order, which has been affirmed at General Term, directs a referee, appointed to take and state the accounts of a receiver of a firm, to "make all such just allowances as the receiver may be entitled to according to law," exceptants to the report of the referee are precluded from questioning the validity of the order under which the receiver was appointed, and the sole question to be considered is whether the payments, for which the receiver asks credit, were proper.

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3. — *What services of a receiver's attorneys may be allowed for.*] Where the court permits a receiver to be heard on motions affecting his trust, and no objection is then made to his standing in court, that objection cannot be raised later, and the receiver should be allowed the reasonable charges of the attorneys who represented him upon the motions.

Under what circumstances a receiver cannot be allowed for prospective services of his attorneys which may become necessary if an appeal is taken, considered. *Id.*

— *Money had and received — contract by the directors to turn over the control of an insurance corporation to a party paying therefor — an action does not lie against them by its receiver for money received.*

See MCCLURE v. LAW..... 450

— *Costs — a receiver may be charged with the costs incurred by his unnecessary defense — although in default, he is entitled to notice of an application to charge him, personally, with costs.*

See FIRST NATIONAL BANK v. WASHBURN..... 518

— *Money paid for a sale of the control of an insurance corporation — it cannot be followed by its receiver into the hands of the holder of an invalid obligation of the corporation.*

See MCCLURE v. TRASK..... 466

REDEMPTION — From mortgage.

See MORTGAGE.

REFERENCE — *Death of one of several defendants before the coming in of the report.*] 1. Where a defendant, without whose presence, although he is a proper party to the action, the issues between the plaintiffs and the other defendants could be determined and a proper judgment be rendered, dies before the referee, to whom the controversy has been referred, has delivered his report, the case comes within section 759 of the Code of Civil Procedure, and the reference may proceed without bringing in as a party the successor to the rights and liabilities of the deceased party.

The death of such a defendant is not a good ground of preliminary objection to a motion, made on the grounds of surprise, irregularities and fraud, to set aside the report of the referee delivered subsequent to such death.

The report subsequently delivered is valid as between the plaintiffs and the surviving defendants, but is, under section 765 of the Code of Civil Procedure, absolutely void as against the deceased party and those whose interests would be affected by the determination of his rights and liabilities.

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2. — *Statutory reference of a claim rejected by an administrator — how the defense of the Statute of Limitations must be presented.*] While it may not be necessary that an administrator state in the rejection of a claim by him or in a stipulation to refer the same that the claim is barred by the Statute of Limitations, yet where no such defense is made or suggested upon the trial and no request is made to the referee to pass upon the question and no exceptions are filed to the referee's report, such defense cannot be presented in the first instance on an appeal. FABURN v. DIMON..... 529

REMAINDER — In real property.

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REMEDY — By arbitration.

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— *Existing in the relation of attorney and client.*

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- *Against fraudulent conveyance.*
See FRAUDULENT CONVEYANCE.
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See LANDLORD AND TENANT.
- *By replevin.*
See REPLEVIN.
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REPLEVIN — *A dismissal of the complaint as to the defendants other than the sheriff—it does not authorize a direction to the plaintiff to return to the sheriff the chattels replevied.*
See OPPENHEIM v. LEWIS..... 882

REPORT — *Of a corporation.*
See CORPORATION.

REPORTER — *Of the Supreme Court — his power to contract for the publication of the reports—the nature and reasonable term of such contract — chapter 474 of 1897.] The Supreme Court Reporter has authority, under sections 249 and 250 of the Code of Civil Procedure, to enter into a contract with a publishing firm for the publication and sale to the public, at the price specified in the statute, of the decisions of the Supreme Court for a reasonable time—and five years, the term of office of such reporter, is a reasonable time for the continuance of such a contract.*
Such contract is not the contract of the State of New York, but the individual contract of the Supreme Court Reporter, and the Legislature is prohibited by the Constitution from increasing, during its continuance, the burden thereby imposed upon the party contracting with the reporter, by reducing the price at which said party is authorized to sell the volumes of the reports to the public. BANKS v. HUN..... 501

REPRESENTATION — *In a contract for the sale of personal property.*
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RESIGNATION — *Corporation — acceptance of a resignation not essential to its effectiveness.*
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REVISED STATUTES — 1 R. S. 342, § 16 — *Polls at town meetings need not be kept open continuously from sunrise to sunset—a town election board acts ministerially—its acts are not reviewable by certiorari.*
See PEOPLE EX REL. VAN SICKLE v. AUSTIN..... 1
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RIPARIAN RIGHTS — *Action to restrain ice cutting injurious to a mill property upon the outlet of a lake—title of riparian owners upon a non-navigable lake—acts of parties giving a practical construction to an agreement—consideration therefor—reasonable use of the waters of a lake in cutting ice from it—estoppel.*
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RULE 27— *Of the General Rules—it does not permit an order fixing the value of attorneys' services to a party to an action, to be docketed as a judgment.*] Rule 27 of the General Rules of Practice prescribing, among other things, that "Any order or judgment directing the payment of money, or affecting the title to property, if founded on petition, where no complaint is filed, may, at the request of any party interested, be enrolled and docketed, as other judgments," is intended to cover that class of applications which can be made only by petition and has no application to an order, made upon the decision of a contested motion, by which the claims of attorneys for services rendered to a party to the action are adjusted; and it is consequently improper for an order in the latter case to direct that judgment be docketed against the party liable, in favor of the claimants, for the amount of their services as fixed. **MYER v. ABBETT**..... 890

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SALE— *Terms of credit in invoices cannot be varied by proof of a trade custom or of former dealings between the parties.*] 1. The unqualified acceptance by vendees, of invoices sent with goods sold, which contain the statement "Terms: 80 days," constitutes an adoption of such terms, which thus become part of the contract of sale, and entitles the vendors to recover interest after such thirty days, and such terms cannot, in the absence of any release supported by a consideration, be deemed to have been waived by force of a trade usage prevalent in the trade in which the parties are engaged, under which interest is not chargeable until vendors have furnished vendees with a further monthly statement of the account, nor will the contract be affected by proof of former dealings between the parties in which the vendors rendered such monthly statements to the vendees.

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2. — *Auction sale—the employment of puffers avoids the sale.*] A sale of real estate at public auction must be actually, what it is nominally, an offer by the owner to sell the property to the highest bidder without any qualification, unless the owner reserves to himself openly at the time of the sale the right to bid upon the property, or openly announces a price below which the property shall not be sold.

Where the owner secretly employs puffers to enhance the price, a sale of the property, under such circumstances, cannot be enforced by the owner.

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3. — *Executory contract of sale—recovery of the money paid on the delivery of the goods on the ground that they were not as they were represented to be.*] Where, under an agreement by a vendor to furnish from his own apples and those he might procure from his neighbors, a certain quantity of apples of a designated quality, to be paid for on delivery, the vendees receive the apples when delivered and make no offer to return them, they are not entitled thereafter to recover the payment made under the contract on the ground that the apples were not as represented by the vendor. **TRYON v. PLUMB**.. 530

4. — *Goods sold—delivery to a third person—submission to the jury of the question who is obligated to pay therefor.*] Whether there exists such a conflict in the testimony of two parties who had negotiated a sale of certain hay and oats, as to whether the purchase was made upon the credit of one of the parties or upon that of a third person at whose stable they were delivered, as requires the submission of that question to the jury, considered.

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— *Interstate Commerce—an ordinary scrub brush, made by convict labor in Ohio and not branded to that effect may, notwithstanding chapter 931 of 1896, lawfully be possessed and sold in the State of New York—limits of the police power of a State.*

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— *Sale upon the installment plan—the vendor is not liable for an assault committed by its collector in attempting forcibly to remove a sewing machine for non-payment by the purchaser.*

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— *Stockbrokers cannot buy in stock for a customer, operating upon a margin, until they have made a reasonable demand for additional margin.*

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— *Of real property.*

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SATISFACTION — *Of a debt*

See PAYMENT.

SATURDAY — *Service or return of process against a Jew on Saturday.*

See PROCESS.

SAVINGS BANK:

See BANKING.

SCHOOL — *Teacher—mandamus to compel reinstatement, denied because of laches involved in his seeking another remedy.]* A renewal of a license to teach having been refused by the city superintendent of schools of the city of New York, the applicant therefor appealed to the State Superintendent of Public Instruction, by whom a decision was made in 1890, determining that the appellant had been unlawfully deprived of his position, and that he was entitled to exercise the functions and receive the emoluments of a teacher, until such time as his certificate (which had been theretofore given to him by the State Superintendent of Public Instruction) should be revoked by competent authority.

He thereupon tendered his services as a teacher, and they having been declined, he made application in 1890 for a mandamus to compel the payment of his salary, which was denied at Special Term, whose decision on appeal was affirmed at the General Term in 1891, and subsequently by the Court of Appeals in 1896.

Thereafter an application was made by him for a peremptory writ of mandamus to reinstate him as a teacher in the public schools of the city of New York.

Held, that such application should be denied because of laches ;

That persistence in the prosecution of a fruitless proceeding in defiance of decisions of the courts, cannot be held to excuse delay in the prosecution of a proper proceeding. PEOPLE EX REL. STEINSON v. Bd. OF EDUCATION.. 452

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SERVICES — *A county clerk cannot be allowed by the board of supervisors for money paid to his assistants in assorting jury slips—proof required under the County Law that the money was necessarily expended.*

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— 1870, chap. 291, tit. 4, §§ 3, 4—*Village bonds—when expenditures are "extraordinary."*

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— 1878, chap. 863, tit. 18, § 27 — *Brooklyn* — liability of, for an award made in a street opening proceeding — effect on the obligation of the city of a charter provision that awards are to be paid pro rata from assessments as collected.

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— 1880, chap. 542 — *Taxation* — a foreign corporation producing kiln dried kindling wood, done up in bundles, is engaged in carrying on a manufacture and is not taxable upon its franchise or business — office and office furniture within the State.

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— 1880, chap. 542 — *Taxation* — a foreign corporation slaughtering sheep and selling the flesh and converting the residue into marketable products is a manufacturing corporation.

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— 1885, chap. 342 — *Mechanic's lien* — payments made in good faith in advance of their becoming due — effect of the contractor giving a note to a subcontractor.

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— 1887, chap. 244, §§ 3, 4 — *Village fire department* — recommendation of chief engineer and assistants — appointed by village trustees — power of the trustees in case of a tie vote of the delegates of the fire companies.

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— 1888, chap. 525 — *Municipal corporation* — "electors," as used in chapter 525 of 1888, authorizing the acquisition of lands for village park purposes — power of the village to issue negotiable bonds to pay for such lands — a holder of a bond is an equitable assignee of the debt.

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— 1890, chap. 565, § 98 — *Street railroads* — a consent of a common council that a street railroad may maintain a certain rate of speed, is subject to a change — police power.

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— 1890, chap. 569 — *Polls at town meetings* need not be kept open continuously from sunrise to sunset — a town election board acts ministerially — its acts are not reviewable by certiorari.

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— 1892, chap. 38, § 278 — *Co-operative town insurance company* — the property insured by, may be used anywhere where the use is customary — a trotting horse, insured in one county, destroyed by fire in another where he was being trained.

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- See* **DUFFY v. BURTON** 51

SHIPPING — *Indemnity bond against damage to vessels by reason of existing contracts — where a vessel is libeled because of such a contract, the indemnitors cannot show that the contract was void.*] 1. Proof that the vendors of three vessels, which it was claimed had been and were intended to be used as consorts, and of which only one, the *St. Louis*, was a steamer, had indemnified their vendee "from any and all loss, damage and liability whatsoever arising from or by reason of any debts or contracts, maritime or otherwise, which were made or contracted prior to the 13th day of February, 1892," and that one of the sailing vessels was subsequently libeled, on a maritime contract of freight, made prior to February 13, 1892, at Milwaukee, where the other sailing vessel then was loaded with oats for Buffalo, entitles the vendee to damages for the detention of the vessel libeled; nor can the vendors, as a defense to such claim for damages, show that the claim under which the vessel was libeled was not valid.

Where it appears that, at the time of the libel and detention, the *St. Louis* was undergoing repairs at Buffalo, and that the vendee did not intend to send her to Milwaukee to tow the two vessels there to Buffalo, and, so far as appears, another steamer could have been procured to tow the other vessel which was not libeled to Buffalo, the vendee cannot recover for the alleged detention of the *St. Louis* and that of such last mentioned sailing vessel, as it does not appear that they were detained as a direct, necessary and natural result of the detention of the libeled vessel.

- NIAGARA FALLS PAPER CO. v. LEE** 217

2. — *Measure of damages — duty to make the damages as small as possible.*] The law imposes upon a party, subjected to an injury by a breach of contract by the other party, the active duty of using reasonable exertions to make the injury as light as possible, and, it seems, of showing with certainty the damages resulting therefrom, and of not leaving them to speculation or conjecture. *Id.*

— An order to pay a third person from a fund — it must have a valuable consideration to make it an equitable assignment — lien for work done upon a vessel.

- See* **SHAW v. TONNS** 39

SLANDER — *Privileged communications — words of a store manager, informed of a theft, spoken to the accused — the accused must show express malice.*] 1. Where employees of a mercantile house have informed its manager, not a member of the firm, that another employee has stolen, and has admitted to them that he has stolen, property of the firm, the subsequent words of the manager, spoken in the presence of others, to the accused, charging him with theft and discharging him, while *prima facie* slanderous, are, in view of the confidential relations of the parties and of the interest of the manager and of his duty to his employers, to be regarded as privileged as matter of law, and the burden is cast upon the accused of showing express malice as matter of fact. **McCARTY v. LAMBLEY** 264

2. — *Inconsistent charge upon the question of express malice and mitigation.*] Where the question of express malice is submitted to the jury in an action for slander, and the court, after stating the necessity of express malice to a recovery, says, in treating of mitigation, in substance, that, if the jury find that the accusation was made in good faith, but under an honest mistake, they may take the honest mistake into consideration in reducing the damages, and subsequently refuses the defendant's request for a charge that if the manager made his statements in the honest belief of their truth, they were privileged, and an absolute defense was established, a new trial should

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be granted, as the legal effect of the charge is to instruct the jury that, although they might find that the words were spoken honestly, in good faith, they might also find that they were spoken maliciously. *Id.*

SPECIFIC PERFORMANCE — *An action for the specific performance of an insurance contract — failure of the company to create and divide a reserve fund — a policyholder cannot sue for specific performance — the action lies against the officers and not the corporation only — constitutional law.*

See *SWAN v. MUT. RESERVE FUND LIFE ASSN.* 255

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STATUTE — *Reference in a statute to a map — attaching additional sheets to a map after it has been filed — 1892, chap. 114.*

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— *Life insurance — proof as to restrictions in a foreign statute.*

See *RAND v. MASSACHUSETTS BENEFIT LIFE ASSN.* 392

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See REVISED STATUTES.

See SESSION LAWS.

STATUTE OF FRAUDS — *It must be pleaded — waiver of the objection that it is not — proof, without objection, of an oral contract not to be performed within one year.] 1. Where proof of an oral contract to render services, which, by its terms, is not to be performed within one year, has been received without objection upon the trial of an action brought to recover damages, because of a breach thereof by the employer, and the answer, denying each and every allegation of the complaint "which is not hereinafter admitted," fails to plead the Statute of Frauds, that defense is not available to the defendant, upon a motion for a nonsuit based upon the Statute of Frauds, made at the end of the trial.*

Semble, that a failure of the plaintiff, when such a motion was made, to call the attention of the court to the fact that the answer did not set up the defense of the Statute of Frauds, was not a waiver of the plaintiff's right to question the soundness of the decision made upon such motion.

LUFEAN v. BRAINARD 212

2. — *An amendment of the answer, setting up the statute, changes the defense.] Semble*, that a court of a justice of the peace has no power, at such a stage of a trial, to permit the defendant to amend by setting up the statute, as such an amendment would change substantially the defense. *Id.*

STATUTE OF LIMITATIONS:

See LIMITATION OF ACTION.

STEAMBOAT:

See SHIPPING.

STOCKHOLDER:

See PRINCIPAL AND AGENT.

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SUMMARY PROCEEDINGS — *By landlords against tenants.*

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SURETY — *On a bond.*

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SURPLUS MONEYS — *On foreclosure — distributed to the widow and heir without notice to a general creditor of the mortgagor — action to compel a return of the money.*

See FELTS v. MARTIN. 60

SURROGATE — *Legacies cannot be paid from the proceeds of realty unless charged upon it — creditors of a decedent cannot be paid the money realized in an action to partition his real estate until the debts are proved in the Surrogate's Court.]* 1. The will of Alexander Loppin gave to each of his three children the sum of \$10,000 and directed that the house in which he lived, and which was the only real estate then owned by him, should be sold and that the balance remaining after the payment of the sum before named should "be divided into five equal part between the survivors or their issue, the said Aimee Bell, Heloise Loppin, Albert Loppin, Alice Loppin, issue of Alexander Loppin, Jeannette, Edward and Irene Loppin, issue of Edouard Loppin." After the death of the testator the house was sold and the amount realized therefrom by the executors was adequate to pay only a part of the legacies. Subsequently an action was brought by the legatces, within three years from the granting of the letters testamentary to the executors, to partition certain lands acquired by the testator subsequent to the making of the will, as to which he died intestate.

Held, that the real estate, as to which Alexander Loppin died intestate, was not chargeable with the legacies in question;

That as it was evidently his intention that the proceeds of the house mentioned in the will should be appropriated to the payment of the legacies, the debts of the testator, which his personalty was insufficient to pay, should be charged upon the other real estate sought to be partitioned; but that before they could be deemed a lien thereon, or any part of the proceeds of such other real estate could be appropriated to their payment, the debts must be proved in the Surrogate's Court. *JOUFFRET v. LOPPIN.* 455

2. — *Power to dismiss a proceeding for the willful failure of the petitioner to serve the citation.]* A Surrogate's Court has the power to dismiss a proceeding brought to revoke the probate of a will, where it appears that the petitioner has willfully refrained from serving certain persons with a citation before its return day. *MATTER OF FRIEDEL.* 382

— *The Statute of Limitations is a defense at law — it will not be considered in an action to construe a will — surrogate to determine as to the payment of legacies.*

See PRATT v. ROMAN CATHOLIC ORPHAN ASYLUM. 353

See EXECUTOR AND ADMINISTRATOR.

TAX — *A foreign corporation producing kiln dried kindling wood, done up in bundles, is engaged in carrying on a manufacture and is not taxable upon its franchise or business — office and office furniture within the State.]* 1. A foreign corporation, having an office and ordinary office furniture within the State of New York, but all of whose capital within the State is employed in making and selling, within the State alone, kindling wood produced from slabs taken in their natural state, sawed into strips and securely compressed in bundles of kiln dried wood of a specific size and shape and designed to be used in that shape for the purpose of kindling anthracite coal, is a corporation wholly engaged in carrying on manufacture in the State of New York, within the meaning of chapter 542 of the Laws of 1890, and the acts amendatory thereof, and, consequently, is not subject to a tax upon its franchise or business.

PEOPLE EX REL. STANDARD WOOD CO. v. ROBERTS. 514

2. — *A foreign corporation slaughtering sheep and selling the flesh and converting the residue into marketable products is a manufacturing corporation.]* A foreign corporation, whose entire capital employed within the State of New York is used in buying sheep, converting them into mutton, refrigerat-

TAX — *Continued.*

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ing the mutton by such processes as improve its quality and preserve it, transporting and selling it, and also in converting other parts of the sheep into marketable products, is engaged in manufacture within the State of New York, and is, therefore, not subject to a tax upon its capital stock under chapter 542 of the Laws of 1880, and the various acts amendatory thereof. *PEOPLE EX REL. N. E. MEAT CO. v. ROBERTS*, ... 521

TAX CERTIFICATE — *A liquor tax certificate is a chose in action—it is assignable on demand as security for advances—a delivery not necessary—it need not be filed—what laches do not impute fraud.*
See NILES v. MATHUSA, ... 488.

TAXATION — *Of costs.*
See COSTS.

TEACHER — *In a school.*
See SCHOOL.

TELEGRAPH COMPANY:
See CORPORATION.

TENDER — *When unnecessary.*
See CONTRACT.

TITLE — *To personal property.*
See PERSONAL PROPERTY.
 — *To real property.*
See REAL PROPERTY.

TOWAGE — *Of vessels.*
See SHIPPING.

TOWN — *Queens county—validity of town bonds issued for highway purposes—a majority of the votes cast upon that question, although not a majority of the highest number of votes cast upon any question, is sufficient.]* The amendment to the County Law (Laws of 1892, chap. 686, § 69) made by chapter 178 of the Laws of 1896, requiring, among other things, that in the county of Queens “a vote of a majority of the electors” of any town “voting at an annual town meeting,” must first be obtained before the board of supervisors of the county can authorize the town to borrow money for highway purposes, was not intended to change the general rule that a measure shall be deemed to have been carried where it receives a majority of the votes which are cast upon that question.

It does not affect the validity of town bonds, issued under a resolution passed at an annual town election and receiving a majority of the votes cast upon that proposition, that, owing to the failure of some of the electors, voting on other questions, to vote on such resolution, it did not receive a majority of the highest number of votes cast at the election upon any question. *MAY v. BERMELE*, ... 58.

— *Co-operative town insurance company—the property insured by, may be used anywhere where the use is customary—a trotting horse, insured in one county, destroyed by fire in another where he was being trained.*
See EDDY v. FARMERS' MUT. INS. CO., ... 109

— *Polls at town meetings need not be kept open continuously from sunrise to sunset—a town election board acts ministerially—its acts are not reviewable by certiorari.*
See PEOPLE EX REL. VAN SICKLE v. AUSTIN, ... 1

TRIAL — *Decision—stating concisely the grounds on which the issues have been decided—it must state how the issues were decided.]* 1. The amendment in 1894 of section 1022 of the Code of Civil Procedure, permitting the court or referee before whom issues have been tried, to file a decision stating concisely the grounds upon which the issues have been decided, instead of one stating separately the facts found and the conclusions of law, did not relieve the court or referee, assuming to take advantage of the amendment, from the necessity of stating how the issues were decided.

TRIAL — Continued.

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Consequently, where there were several issues of fact and of law involved, in an action brought by a receiver for the benefit of creditors of a copartnership to obtain a fund representing property described in a bill of sale and chattel mortgage executed by the members of the copartnership, and which the receiver alleged to have been fraudulent and void as to creditors, it was *Held*, that a decision which merely stated that the plaintiff was entitled to the fund, "that said bill of sale and said alleged chattel mortgage be set aside as void and in fraud of creditors," and that the plaintiff was entitled to costs of the action, was insufficient to support a judgment.

SHAFFER v. MARTIN 304

2. — *Where the questions of fact are to be decided by the court — how considered on appeal.*] Where both parties request the direction of a verdict in their favor, and neither requests the submission of any question to the jury, the questions of fact are for the court and are to be determined, upon appeal, in support of the verdict directed. LAZARE v. ALLEN 616

— *Arson — a priest, by his servants, burning a parochial school building to get the insurance — evidence as to his relations with his servants — his insolvency — a telegram sent to a servant on the day before the fire — the accused should account for his whereabouts — res gestæ of the flight of an accomplice — acts of insurance agents applied to for insurance — admissions of accused that he could not get property insured in his own name — demand after a loss that moneys be paid to the trustees of his church and not to the bishop — letter of his bishop charging the priest with "public drunkenness" — motive for arson — charge as to the failure of the accused to testify.*

See PEOPLE v. FITZGERALD 139

— *Slander — privileged communications — words of a store manager, informed of a theft, spoken to the accused — the accused must show express malice — inconsistent charge upon the question of express malice and mitigation.*

See MCCARTY v. LAMBLEY 264

— *Replevin — a dismissal of the complaint as to the defendants other than the sheriff — it does not authorize a direction to the plaintiff to return to the sheriff the chattels replevied.*

See OPPENHEIM v. LEWIS 332

— *Action against an elevated railroad for rental damages — examination of witnesses as to rental values of specific properties, allowable only on cross-examination.*

See O'SULLIVAN v. NEW YORK ELEVATED R. R. Co. 384

— *Negligence — failure of the master to have a machine oiled, resulting in its becoming unmanageable and cutting off an employee's fingers — proof making the employer's liability a question for the jury.*

See PRESCOTT v. OTTMAN LITHOGRAPHING CO. 397

— *Negligence — a brakeman falling at night into a sluiceway in a railroad yard while coupling cars — the question whether the railroad furnished a safe place is for the jury.*

See MILLEN v. N. Y. CENTRAL & H. R. R. Co. 92

— *Libel — when vindictive damages are proper — a second and further cross-examination rests in the discretion of the court.*

See KARWOWSKI v. PITASS 118

— *Contract to supply a windmill and water tower — their failure to supply the house with water — charge of the judge.*

See BARNES v. LOEW 17

— *New York police commissioners — charge that a policeman procured his appointment by fraud — written charges and a hearing not required.*

See PEOPLE ex REL. COHEN v. MARTIN 380

— *Statutory reference of a claim rejected by an administrator — how the defense of the Statute of Limitations must be presented.*

See FABURN v. DIMON 529

— *Goods sold — delivery to a third person — submission to the jury of the question who is obligated to pay therefor.*

See RATHBUN v. MAJEWSKI 437

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— <i>Petit larceny—good character of the accused—conviction reversed as against the weight of evidence.</i>	
See <i>PEOPLE v. GOLDBERG</i>	444
— <i>Statute of Frauds—an amendment of an answer, setting up the statute, changes the defense.</i>	
See <i>LUPEAN v. BRAINARD</i>	212
— <i>A second and further cross-examination rests in the discretion of the court.</i>	
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— <i>When a judgment by default must be directed by the court.</i>	
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— <i>Discrediting testimony elicited from the adverse party.</i>	
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— <i>Effect of moving for the direction of a verdict.</i>	
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TRUST—Remaindermen are entitled to notice of an application for the appointment of a new trustee of an express trust which has vested in the court.]

1. Under section 91 of the Real Property Law (Laws of 1896, chap. 547), providing in substance that an express trust shall, upon the death of its surviving trustee, vest in the Supreme Court and be executed by its appointee, "who shall not be appointed until the beneficiary thereof shall have been brought into court by such notice, in such manner as the court or a justice thereof may direct," remaindermen are entitled to notice of an application for such appointment, and an *ex parte* order, appointing a trustee solely upon the application of the life beneficiary, should be vacated where the trustee thus appointed bears such a relation to the life tenant as may, under the circumstances existing in the particular case, prejudice the interests of the remaindermen. *MATTER OF WELCH*..... 412

2. — *Notice, how given.*] The notice to be given, and the method of giving it, rest in the discretion of the court, and if notice can be given, even out of the jurisdiction, want of notice should not be encouraged. *Id.*

3. — *An express trust—a conveyance by the remainderman to the life beneficiary does not terminate it.*] The trust created by a devise of land to a trustee to receive the rents and profits of the same and pay said rents and profits over to or for the benefit of Wilson D. Oviatt for and during the term of his natural life, and at his death to sell said premises and convert the same into money and pay the same over to Percy D. Oviatt at the time he shall arrive at the age of twenty-one years, or authorizing said trustee to convey said premises to him at his discretion, as to which will be the best for said Percy, is not terminated by a conveyance by Percy D. Oviatt on his arrival at the age of twenty-one years to Wilson D. Oviatt of all his interest in the premises and a release by Wilson D. Oviatt to the trustee.

The validity of chapter 452 of the Laws of 1893 and chapter 547 of the Laws of 1896, section 83, so far as they assume to furnish a means by which a beneficiary can alienate his trust interest and thus terminate the trust without the consent of the trustee, considered. *OVIATT v. HOPKINS*..... 168

4. — *Appointment of a new trustee of an express trust—notice to remaindermen—rights of remaindermen not within the State.*] Upon the death of the sole trustee of an express trust the court has power, under section 91 of the Real Property Law (Chap. 547, Laws of 1896), to appoint a successor upon notice to the actual beneficiary and also to the remaindermen; and if any of the latter, having an interest, are without the jurisdiction of the court and cannot be served with notice, they may apply to the court for protection.

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TRUSTEE—Of a corporation.

See *CORPORATION*.

UMPIRE:*See* ARBITRATION.**UNDERTAKING** — *Other than on appeal.**See* BOND.**UNITED STATES CONSTITUTION:***See* CONSTITUTIONAL LAW.

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USAGE — *Sales — terms of credit in invoices cannot be varied by proof of a trade custom or of former dealings between the parties.**See* GOULDS MFG. CO. v. MUNCKENBECK 612**USURY** — *Examination of the plaintiff before trial — objection that it will require the disclosure of facts constituting the crime of usury.**See* FOX v. MILLER 838**VENDOR AND PURCHASER** — *Sale of real estate — action by the vendee to recover liquidated damages — failure to show performance or a tender thereof — exacting what the contract does not provide should be given.] The right of a vendee, in a contract for the sale of real estate, to recover liquidated damages, fixed by the contract in case of the failure of either party to perform, depends upon proof by him of a tender of performance or of his willingness and ability to perform in case performance was prevented or was expressly waived by the vendor.**Where, in such a case, it appears that the vendee, although having the money requisite to make his payment in a bank, did not have the money with him, or tender a check therefor or execute and have ready for delivery a bond and mortgage, which he was required by the contract to give the vendor in part payment, but insisted that he was entitled to certain timber not standing on the premises, and not mentioned in the contract, neither performance nor tender of performance is shown upon his part, and he is not in a position to recover the liquidated damages provided to be paid in case of a breach.* LIGHTHAL v. MCGUIRE. 248*— Money had and received — action by a grantor against a mortgagee who has required the purchaser to pay a sum (deducted from the purchase price) in excess of the amount due.**See* LAWATSCH v. COONEY 470*— Mortgage foreclosure — defense of false representations — to whom not available.**See* COMMERCIAL BANK v. CATTO 236*— Auction sale — the employment of puffers avoids the sale.**See* BOWMAN v. MCCLENAHAN 348*See* DEED.**VERDICT** — *Of a jury.**See* TRIAL.**VERIFICATION** — *Of a petition in summary proceedings — presumption as to when the verification was made.**See* LANDLORD AND TENANT.*— Of a mechanic's lien.**See* LIEN.**VESSEL:***See* SHIPPING.**VILLAGE:***See* MUNICIPAL CORPORATION.**VINDICTIVE DAMAGES:***See* DAMAGES.**VOTE** — *At an election.**See* ELECTION.

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WAIVER — *Statute of Frauds* — it must be pleaded — waiver of the objection that it is not — proof, without objection, of an oral contract not to be performed within one year.

See LUPEAN v. BRAINARD..... 212

— *Fire insurance* — where the adjuster of the company denies all liability, the insured need not furnish proofs of loss — estoppel.

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— *Life insurance* — waiver of non-payment of premiums.

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— *Conversion* — necessity of a demand or a waiver thereof.

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WARRANTY — *On sales of personal property.*

See SALE.

WATERCOURSE — *Action to restrain ice cutting injurious to a mill property upon the outlet of a lake* — title of riparian owners upon a non-navigable lake — acts of parties giving a practical construction to an agreement — consideration therefor — reasonable use of the waters of a lake in cutting ice from it — estoppel.

See HAZELTON v. WEBSTER..... 177

WATER TOWER — *Contract to supply a windmill and water tower* — their failure to supply the house with water.

See CONTRACT.

WILL — *Vested remainders* — construction of a clause of a will "from and after her decease my will is that all of my said property be disposed of according to the statutes." 1. A testator, after bequeathing and devising all his residuary estate to his wife for life, provided "from and after her decease, my will is that all of my said property be disposed of according to the statutes of the State of New York governing the descent of real property and the distribution of personal estates."

Held, that all persons who were his heirs at law at the time of the testator's death, took vested remainders in his real estate, the enjoyment of which, only, was postponed until the termination of the life estate of the widow.

HERSEE v. SIMPSON..... 100

2. — *A bequest to an unincorporated association is void.*] A voluntary unincorporated association cannot take a bequest, even for charitable purposes. *PRATT v. ROMAN CATHOLIC ORPHAN ASYLUM*..... 352

3. — *Presumption as to the law of a foreign country.*] In the absence of proof as to the law of a foreign country, the courts of the State of New York will either indulge in no presumption at all or will assume that the foreign law is the same as that of the State of New York. *Id.*

4. — *A bequest to the poor of a church is invalid.*] A bequest to the poor of an incorporated church is invalid because of indefiniteness, even though the church be competent to take. *Id.*

— *The Surrogate's Court* — power to dismiss a proceeding for the willful failure of the petitioner to serve the citation.

See MATTER OF FRIEDEL..... 382

WINDMILL — *Contract to supply a windmill and water tower* — their failure to supply the house with water.

See CONTRACT.

WITNESS — *Cross-examination as to whether he has been convicted of a crime and as to his having been in jail.*] 1. It is proper on the cross-examination of a witness to ask whether he has been convicted of a crime or misdemeanor.

Semble, that the question as to how many times the witness has been in jail, rests in the discretion of the court. *PERHAM v. NOEL*..... 516

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2. — *Proof that a "flash" was caused by touching an iron brace with a wire.*] A witness may testify that a flash of light was occasioned by the touching of a wire to the iron brace attached to a telegraph pole — such testimony is the statement of a fact, not the expression of an opinion.

DWYER v. BUFFALO GENERAL ELECTRIC CO 124

8. — *A second and further cross-examination rests in the discretion of the court.*] The extent to which a further cross-examination of a party, who has already been quite extensively cross examined, shall be carried, is in the discretion of the court. KARWOWSKI v. PITASS. 118

— *Arson — facts not constituting one an accomplice as matter of law — necessity of a criminal intent, which must be found as matter of fact — proof of a fire in a neighboring city, which was a part of the same plot, is admissible in corroboration of the testimony of an accomplice.*

See PEOPLE v. ZUCKER. 363

— *Action against an elevated railroad for rental damages — examination of witnesses as to rental values of specific properties, allowable only on cross-examination.*

See O'SULLIVAN v. NEW YORK ELEVATED R. R. CO. 384

— *His own acts, but not the decision of others, may be shown on the cross-examination of the prisoner to discredit him.*

See PEOPLE v. DORTHY. 308

— *Crime — charge as to the failure of the accused to testify.*

See PEOPLE v. FITZGERALD. 139

— *Contradicting a witness by proof of his own statements.*

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— *Discrediting testimony elicited from the adverse party.*

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— *Examination of, before trial.*

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